

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1468

United States Court of Appeals

For the Second Circuit

No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of
New York, Administrator of the Estate of HAGEN PASTEWKA,
Deceased and MONICA PASTEWKA, Individually,

Plaintiff-Appellant,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees,

and consolidated cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

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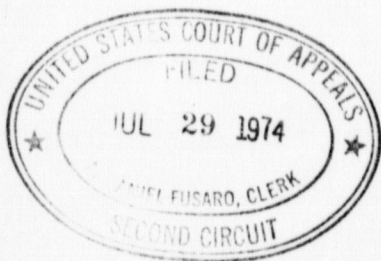
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PAGINATION AS IN ORIGINAL COPY

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* The lead case following consolidation of these matters for all purposes, and also lead docket sheet.

** Texaco counsel, although they do not agree to the italicized words, nonetheless "have in no way objected to or tried to change" them. Texaco counsel's letter of 9 July 74 to Vessel and Cargo counsel.

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* Texaco counsel take the same position regarding these italicized words as is set out in footnote ** on p. iii.

Docket Entries

72 Civ. 5009

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
PETER RAHMANN Deceased & INGE RAHMANN Individ-
ually,

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE	PROCEEDINGS
11-27-72	Filed Complaint issued summons.
12-8-72	Filed Summons and marshals ret. Served: Texas Panama Inc. on 11/29/72 Texaco Inc. on 11/29/72.
12-15-72	Filed Order extending time for Texaco Inc. and Texaco Panama, Inc. to answer complaint to 2/19/73. Metzner, J. (mailed notice).
3-2-73	Filed Order of consolidation. Ordered that mo- tion for consolidation is granted. This action with 13 others consolidated into 72 civil 5008 for All Purposes. Metzner, J. mailed notices.
3-28-74	Filed Judgment and order that defendants have judgment against pltfs dismissing the complaint as indicated subject to the provisions stated herein.—Clerk (See 72 Civ 5008) m/n.

Docket Entries

72 Civ 5010

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
HELMUT HEINRICH ULRICH PASSOW, Deceased.

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE	PROCEEDINGS
11-27-72	Filed complaint and issued summons.
12-8-72	Filed summons with marshal's ret. Served Texaco Inc. by Gertrude H. Farrington on 11/29/72. Served Texaco Panama Inc. by Gertrude H. Farrington on 11/29/72.
12-15-72	Filed Order extending Texaco, Inc. and Texaco Panama, Inc.'s time to answer, etc. to 2/19/73, etc. Metzner, J. (mailed notice).
3-2-73	Filed Order of Consolidation. Ordered that motion for consolidation is granted. This consolidated into 72 Civil 5008 for all purposes. Carried under 72 Civil 5008 Metzner J. (M/N).
3-28-74	Filed judgment and order that defendants have judgment against the plaintiffs dismissing the complaint as indicated subject to the provisions stated herein—Clerk. (see 72 Civ 5008) m/n.

Docket Entries

73 Civ. 92

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
ERK FERDINAND TIMM, deceased and ROSWITHA FERDI-
NAND TIMM, individually

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 1-5-73 Filed Complaint & Issued Summons.
- 1-17-73 Filed summons with marshals ret, Served Texaco Inc. on 1/11/73. Also served Texaco Panama, Inc. on 1/11/73.
- 1-29-73 Filed Order that the time for Texaco Inc. & Texaco Panama Inc. to answer the complaint is extended to 2/19/73, without prejudice to an application on notice for a further extension. So Ordered Metzner J. m/n.
- 3-2-73 Filed Order of consolidation, Ordered that the motion for consolidation is granted. This action with 13 others consolidated into 72 civil 5008 for all purposes. Metzner J. (mailed notices).
- 3-28-74 Filed Judgment and order that defendants have judgment against the plaintiffs dismissing the complaint as indicated subject to the provisions stated herein.—Clerk (see 72 Civ 5008) m/n.

Docket Entries

73 Civ. 93

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
JUAN BENITO MARTINEZ ALONZO deceased & ROMONA
MARTINEZ ALONZO individually.,

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 1-5-73 Filed complaint & issued summons.
- 1-29-73 Filed Order that the defts time to answer the
complaint is extended to 2-19-73. So Ordered
1-26-73. (mailed notice) Metzner, J.
- 3-2-73 Filed Order of Consolidation—Ordered that
motion for consolidation is Granted. This case
consolidated into 72 Civ. 5008 for All Purposes.
Carried under 72 Civil 5008 (mailed notice)
Metzner, J.
- 3-28-74 Filed Judgment and order that defendants have
judgment against pltf's dismissing the complaint
as indicated subject to the provisions stated
herein—Clerk. (see 72 Civ 5508)
- 1-17-73 Filed Summons with Marshal's return. Served
Texaco Inc. & Texaco Panama Inc. on 1-11-73.

*Docket Entries*73 Civ. 94

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
SERAFIN PUNAL CASTRO, Deceased

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 1-5-73 Filed complaint and issued summons.
- 1-17-73 Filed summons and entered marshal's return served on:
Texaco, Inc. by Ruth N. Freese on 1-11-73 &
Texaco Panama, Inc. by Ruth N. Freese on 1-11-73.
- 1-29-73 Filed order. Ordered that the time for Texaco, Inc. and Texaco Panama Inc. to answer is extended from 1-31-73 to 2-19-73 without prejudice to an application on notice for a further extension. (mn) Metzner, J.
- 3-2-73 Filed Order of Consolidation. Ordered that motion for consolidation is granted. This case consolidated into 72 Civ 5008 for all purposes. Carried under 72 Civil 5008, (mn) Metzner, J.
- 3-28-74 Filed Judgment and order that defendants have judgment against the plaintiffs, dismissing the complaint as indicated subject to the provisions stated herein. Clerk (see 72 Civ. 5008) m/n.

Docket Entries

73 Civ. 95

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
JOSE ORDENEZ TRINANES, Deceased & VINCENTA ORDENES
TRINANES, Individually

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 1-5-73 Filed Complaint. Issued Summons.
- 1-17-73 Filed Summons with Marshal's Returns: Served Texaco, Inc. by Ruth N. Freese, Asst. Secy on 1/11/73. Served Texaco Panama, Inc. by Ruth N. Freese, Asst. Secy on 1/11/73.
- 1-29-73 Filed Order extending Defts time to answer complaint from 1/31/73 to 2/19/73. Ordered that time is extended of the above date without prejudice to an application on notice for a further extension. Metzner, J.
- 3-2-73 Filed Order of Consolidation. Ordered that motion for consolidation is granted. The action with 13 others consolidated in to 72 Civ. 5008 for All Purposes. Metzner, J. (Mailed Notice).
- 3-28-74 Filed Judgment and order that defendants have judgment against the plaintiffs dismissing the complaint as indicated subject to the provisions stated herein.—Clerk. (see 72 Civ. 5008) m/n.

Docket Entries

73 Civ. 96

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
ADOLF HERGOVICH, deceased

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 1-5-73 Filed complaint and issued summons.
- 1-17-73 Filed summons with marshal's ret. Served Texaco Inc. by Ruth N. Freese, Asst. Sec. on 1/11/73. Texaco Panama, Inc. by Ruth N. Freese, Asst. Sec. on 1/11/73.
- 1-29-73 Filed Orders extending time for Texaco Inc. and and Texaco Panama Inc. to answer complaint to 2/19/73. Metzner, J. (mailed notice).
- 3-2-73 Filed Order of Consolidation. Ordered that motion for consolidation is Granted. This case consolidated into 72 Civ. 5008 for all purposes. Carried under 72 Civil 5008. Metzner, J.
- 3-28-74 Filed Judgment and order that the defendants have judgment against the plaintiffs dismissing the complaint as indicated, subject to the provisions stated herein. Clerk. (see 72 Civ 5008)

Docket Entries

73 Civ. 97

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
ANTONIO GALDEANO BLANCO, Deceased, and ISABEL
SOLER RAMIERZ individually,

Plaintiffs,

—against—

TEXACO INC., and TEXACO PANAMA, INC.

Defendants.

DATE

PROCEEDINGS

-
- 1-5-73 Filed complaint & issued summons.
 - 1-17-73 Filed summons with marshals return: Served.
Texaco Inc. on 1-11-73 Texaco Panama, Inc. on
1-11-73.
 - 1-29-73 Filed Order that time for Texaco, & Texaco, &
Texaco Panama Inc. to answer, the complaint is
ext. from 1-31-73 to 2-1-73. So ordered. Metz-
ner, J.
 - 3-2-73 Filed Order of Consolidation. Ordered that mo-
tion for consolidation is granted. This case
consolidated with 72 Civ 5008 for all purposes.
Carried under 72 Civ 5008. Metzner, J.
 - 3-28-74 Filed Judgment and order that defendants have
judgment against the plaintiffs dismissing the
complaint as indicated, subject to the provisions
stated herein.—Clerk (see 72 Civ 5008) m/n.

Docket Entries

73 Civ. 98

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
REINHARD STANDFEST, Deceased

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 1-5-73 Filed complaint and issued summons.
- 1-17-73 Filed summons with marshals return: Served:
Texaco Inc. 1-11-73, Served Texaco Panama
Inc. 1-11-73
- 1-29-73 Filed stip "Order that the time for Texaco Inc.
and Texaco Panama Inc. to appear etc. ed to
February, 19th, 1973. Metzner, J. M/N.
- 3-2-73 Filed Order to Consolidation. Ordered that
motion for consolidation is granted. This action
with 13 others consolidated into 72 Civil 5008
for All Purposes. Metzner, J. (mailed notice).
- 3-28-73 Filed Judgment and order that defendants have
judgment against the plaintiffs dismissing the
complaint as indicated, subject to the provisions
stated herein.—Clerk. (see 72 Civ 5008) m/n.

Docket Entries

73 Civ. 99

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
LUIS MARTINEZ ALONZO, deceased

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 1-5-73 Filed complaint and issued summons.
- 1-17-73 Filed summons with marshal's ret. Served Texaco, Inc. by Ruth N. Freese on 1/11/73. Served Texaco Panama, Inc. by Ruth N. Freese on 1/11/73.
- 1-29-73 Filed Order extending time for Texaco Inc. and Texaco Panama Inc. to appear, answer etc. complaint to 2/19/73. Metzner, J. (mailed notice).
- 3-2-73 Filed Order of consolidation. Ordered that motion for consolidation is granted. This case consolidated into 72 civil 5008 for all purposes, Carried under 72 civil 5008 Metzner, J. (mailed notices).
- 3-28-74 Filed Judgment and order that defendants have judgment against the plaintiffs dismissing the complaint as indicated, subject to the provisions stated herein. Clerk (see 72 Civ 5008) m/n.

Docket Entries

73 Civ. 117

THOMAS I. FITZGERALD, Public Administrator of the
County of New York, Administrator of the Estate of
DIETER PUPHAL, Deceased,

Plaintiff,

—against—

TEXACO INC., and TEXACO PANAMA, INC.

Defendants.

DATE

PROCEEDINGS

- 1-8-73 Filed complaint & issued summons.
- 1-17-73 Filed summons with marshals return: Served:
Texaco, Inc. on 1-11-73. Texaco, Panama, Inc.
on 1-11-73.
- 1-29-73 Filed Order that time for Texaco Inc. & Texaco
Panama, Inc. to answer, complaint is ext. from
1-31-73 to 2-19-73. Metzner, J.
- 3-2-73 Filed Order of Consolidation: Ordered that mo-
tion for consolidation, is granted. This case
consolidated with 72 Civ 5098 for all purposes.
Carried under 72 Civ 5008. Metzner, J.
- 3-28-74 Filed Judgment and order that defendants have
judgment against the plaintiffs dismissing the
complaint as indicated, subject to the provisions
stated herein.—Clerk (see 72 Civ 5008) m/n.

Docket Entries

73 Civ. 166

HAPAG-LLOYD, as owner of the M/V BRANDENBURG

—against—

TEXACO PANAMA, INC. as owner of the M/V TEXACO
CARRIBBEAN

DATE

PROCEEDINGS

- 1-9-73 Filed complaint & issued summons.
- 1-11-73 Filed Amended Complaint.
- 1-24-73 Filed summons with marshal's ret. Served
Texaco Panama, Inc. by Mr. McLure on 1/16/73.
- 1-24-73 Filed summons with marshal's ret. Served
Texaco Panama, Inc. by Ruth N. Freese, Asst.
Sec. on 1/16/73.
- 2-22-73 Filed Affidavit of MacDonald Deming.
- 3-2-73 Filed Order of Consolidation. Ordered that mo-
tion for consolidation is granted. This case
consolidated Into 72 Civil 5008 for All purposes.
Carried under 72 Civil 5008. Metzner, J.
- 3-28-74 Filed Judgment and order that defendants have
judgment against the plaintiffs dismissing the
complaint as indicated, subject to the provisions
stated herein.—Clerk (see 72 Civ 5008) m/n.

Docket Entries

73 Civ. 182

STORK AMSTERDAM N.V.; INDUSTRIAS LACTEAS DOMINICANAS S.A. "INDULAC"; CORNELIS NOORDHOEK; QUINTANA HNOS; INC.; N.V. KONINKLIJKE DISTILLEERDERIJEN "ERVEN LUCAS BOLS" (Formerly N.V. AMSTERDAMSCH E LIKEURSTOKERIJ "T LOOTSJE" DER ERVEN LUCAS BOLS") J. WRAY AND NEPHEW LTD.; N.V. VERKOOPASSOLIA TIE DER UERENIGDE LIKEURSTOKERIJEN V.U.L.; THE RUM COMPANY (JAMAICA) LTD.; P. VAN LEEUWEN JR.'S BUIZEJHANDEL N.V.; NOOYEN N.V.; HANDELSONDERNEMING "OKAHNI" N.V.; KOOLJMAN'S AGENCIES INC.; OVERSEAS CONSTRUCTION COMPANY; OVERSEAS CONSTRUCTION COMPANY CARIBBEAN, LTD.; KONINKLIJKE NEDERLANDSE MAATSCHAPPIJ VOOR HAVENWERKEN N.V.; NETHERLANDS HARBOUR WORKS COMPANY (NETHERLANDS ANTILLES) N.V.; ANTEM N.V.; BOGENA N.V.; PET CARE, N.V.; N.V. MADURO INTERMAVEN; S.E.L. MADURO AND SONS LTD.; LAGENDIJK'S POETSKATOEN—EN POETSLAPPEN—FABRIKEN N.V.; CARLOS C. JESURUM AND CO.; LA CITRIQUE BELGE S.A.; RAPID SALES COMPANY LTD.; ZEMENT EXPORT RHEINWEST G.M.B.H.; A.G. "WESER" SEE—BECKWERFT; MATAB N.V.; and VIHAMIJ BUTTINGER N.V.,

Plaintiffs,

—against—

TEXACO PANAMA, INC. as owner of the M/V TEXACO CARIBBEAN,

Defendant.

DATE

PROCEEDINGS

1-10-73 Filed complaint & issued summons.

Docket Entries

- 1-24-73 Filed summons with marshals ret; served Texaco Panama, Inc. on 1/16/73.
- 2-22-73 Filed Pltffs affidavit by MacDonald Deming.
- 3-2-73 Filed Order of consolidation. Ordered that the motion for consolidation is granted. This action with 13 others consolidated into 72 civil 5008 for all purposes. Metzner, J. mailed notices).
- 3-28-74 Filed Judgment and order dismissing the complaint (defendants have judgment against the plaintiffs) subject to the provisions stated herein. —Clerk (see 72 Civ 5008) m/n.

72 Civ. 5008 (SDNY) *

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, deceased and MONICA PASTEWKA, individually,

—against—

TEXACO INC., and TEXACO PANAMA, INC.

DATE

PROCEEDINGS

- 11-27-72 Filed Complaint, Issued Summons.
- 12-8-72 Filed Summons with marshals return. Served Texaco Inc. 11-29-72.

* The lead case following consolidation of these matters for all purposes, and also lead docket sheet.

Docket Entries

DATE	PROCEEDINGS
12-15-72	Filed Order that defts Texaco, Inc. and Texaco Panama, Inc. having moved this Court ex parte for an order extending their time within which to appear answer etc. with respect to the complaint, etc. Ordered that the time for Texaco Inc. and Texaco Panama Inc. to appear etc. or move is extended to Feb. 19th, 1973 without prejudice to application on notice for a further extension, Metzner, J.
2-22-73	Filed memo endorsed on order to show cause to consolidate: The defts motion to is hereby adjourned until Feb. 23, 1973, before Metzner, J. The time for defts to answer with respect to all actions involved in the motion to consolidate is hereby extended Feb. 23, 1973. So ordered. Penny, J. M/N.
2-22-73	Filed defts meriorandum of law in support of their motion purs to Rule 62 of the FRCP.
2-22-73	Filed Order to Show Cause to consolidate.
2-28-73	Filed 2nd Memo Endorsed on Order to Show Cause file 2-22-73. On 2-21-73 this court extended the time for the defts. to answer with respect to all actions involved in the motion to consolidate until 3-2-73. Defts motion for consolidation is granted on default, Submit Order—Metzner, J.
3-2-73	Filed Notice of Motion re, 3/14/73 at 10 AM re: dismiss as to both defendants.
3-2-73	Filed Memorandum of Law in support of defendants' motion to dismiss.

Docket Entries

DATE	PROCEEDINGS
3-2-73	Filed Order of Consolidation. Ordered that motion for consolidation is granted, consolidating this action with companion action bearing index numbers 72 Civ 5009, 72 Civ. 5010, 73 Civ. 92, 73 Civ. 93, 73 Civ. 94, 73 Civ. 95, 72 Civ. 96, 73 Civ. 97, 73 Civ. 98, 73 Civ. 99, 73 Civ. 117, 73 Civ 166 and 73 Civ. 182 for all purposes: Ordered that the 14 consolidated actions now bear the index number of the lead case 72 Civ. 5008, Metzner, J. (mailed notice).
4-9-73	Filed Consent Order extending time to answer from 4/9/73 to 5/21/73 and including 6/5/73 re: in opposition to defts' motion for dismissal. Metzner, J.
4-17-73	Filed Hapag-Lloyd "Indulac" 's interrogs. to deft Texaco Panama, Inc.
5-1-73	Filed pltfts Hapag-Lloyd A.G.'s request for production of documents under FRCP Rule 34.
4-30-73	Filed Consent Order. Ordered to at the time for pltfts to submit their papers in opposition to defts' motion for dismissal is extended from 3-9-73 and that defts' time within which to reply be extended including 4-24-73. Metzner, J.
5-15-73	Filed Defts Notice of Motion before Judge Metzner, Room 2201, 5/23/73, 10:00 A.M. re: Pltfts' Hapag Lloyd A.G. and Stork Amsterdam N.V. at Request for Production of Documents, sic. & Affdvt of Alvin L. Stern.
5-15-73	Filed Memorandum of Law in support of Defts' Motion for Protective Order.

Docket Entries

DATE	PROCEEDINGS
5-16-73	Filed Defts Objections to Interrogs.
5-16-73	Filed Defts Response to Request for Production of Documents.
5-18-73	Filed Pltft's Order to Show Cause with stay before Judge Metzner, Room 906, 5/28/73, 10:00 A.M. re: setting 6/7/73 as date for hearing of Deft., etc.
5-18-73	Filed Pltffs' Memorandum of Law in support of Order to show cause.
8-7-73	Filed reply affdt. of MacDonald Deming (for pltf) in support of Hapag-Lloyd and Stork Amsterdam et als appl. for discovery.
8-7-73	Filed reply affdt. of Melvin Tublin (deft. Texaco Panama Inc.) in support of defts. motion for a protective order and in oppos. to pltfs. application for discovery.
8-7-73	Filed report of Mag. Jacobs (as indicated).
8-7-73	Filed pltfs. affdt. concerning discovery needed to oppose forum non con. motion by defts.
8-7-73	Filed pltfts. affdt. in support for permission to discover facts by way of interrog. prod. of doc, etc.
8-7-73	Filed affdt. of Alvin Stern (deft) in oppos. to motion of pltf. brought on 'y an order to show cause dated May 18, 1973 etc. (filed in court).
8-6-73	Filed memo end. on Order to Show Cause dated May 18, 1973—The court having read the report of Mag. Jacobs, the letters submitted by counsel

Docket Entries

DATE	PROCEEDINGS
	in connection with that report and reviewing the file, confirm the report as submitted. So ordered. Metzner, J. m/n.
8-7-73	Filed memo end. on motion dated May 15, 1973 for pltf. to produce doc, etc.—The Court having read the report of Mag. Jacobs, the letters submitted by counsel in connection with that report and reviewing the file, confirms the report as submitted. So ordered, Metzner, J. m/n.
8-14-73	Filed pltffs notice of deposition of defendants Texaco Inc. and Panama Inc. by named officers.
8-15-73	Filed pltffs notice to admit.
8-20-73	Filed Pltffs. Notice of Depositions of Defts. Texaco Inc. and Texaco Panama Inc. by named Officers or persons designated by Defts. purs. to Rule 30 (b) (6).
8-20-73	Filed Defts. Objection to Plaintiffs' Notice to Admit.
9-28-73	Filed Pltffs. Memorandum as supplement for joinder of pltffs in action.
10-9-73	Filed pltf. Robert Borden notice of new address: c/o 4319 So. 135th St., Seattle, Wash. 98168.
10-12-73	Filed pltfs. OSC requiring defts. to make available John Mingay and Cristensen for deposition, etc. as indicated; and affdt. ret. Oct. 19, 1973.
10-12-73	Filed pltfs. memorandum of law in support of OSC with stay.

Docket Entries

DATE

PROCEEDINGS

- 11-16-73 Filed report of Magistrate Jacobs re-order to show cause filed 10-12-73 (attached OSC).
- 11-16-73 Filed memo endorsed on O.S.C. filed 10-12-73: This motion was referred to Magistrate Jacobs to hear and report because the Magistrate had heard prior motions and there was still pending before him a motion to dismiss. The issues are fully discussed in his reports dtd. 7-25-73 and 10-24-73. Clearly, plttffs' are entitled to a further answer to interrogs #1, purs. to the order of 8-6-73. I find plttff's request for additional discovery is clearly outside the scope of the order of 8-6-73. There is nothing in the papers presented on this motion that calls for a modification of that order. Defendants to furnish the additional answer to interrogs. #1 as set forth on page 3 of the report of the Magistrate Jacobs dtd. 10-24-73. This answer shall be filed on or before Nov-26-73. Plttff. shall file with Magistrate Jacobs any papers in opposition to the motion to dismiss on or before Dec-10-73. So ordered. Metzner, J. (m/n).
- 2-8-74 Filed deft's (Texaco Panama, Inc.) answers to interrogs.
- 2-8-74 Filed deft's (Texaco Panama, Inc.) further answers to interrogs.
- 2-8-74 Filed deft's (Texaco Panama, Inc.) response to request for production of documents.
- 3-27-74 Filed plaintiff's affdvt. of MacDonald Deming in opposition to deft's motion to dismiss.
- 3-27-74 Filed Brandenburg's memorandum of law in opposition to defts' motion to dismiss.

Docket Entries

DATE	PROCEEDINGS
3-27-74	Filed plaintiff's affdvt. of Harvey Goldstein in opposition to defts motion to dismiss.
3-27-74	Filed plaintiff's memorandum of law in opposition to defts' motion to dismiss.
11-16-73	Filed defts. affidavit in opposition to motion.
3-27-74	Filed defts' reply affdvt. of Alvin L. Stern re motion to dismiss.
3-27-74	Filed defts' reply memorandum of law re motion to dismiss.
3-27-74	Filed pltf's surreply affdvt. of Harvey Goldstein in opposition to defts' motion to dismiss.
3-27-74	Filed pltf's surreply memorandum of law in opposition to motion to dismiss.
3-27-74	Filed report of Magistrate Jacobs.
3-27-74	Filed memo endorsed on defendants' motion to dismiss consolidated actions: The 19 page report of the magistrate reviews in detail the questions from all aspects. I have read that report and all of the papers and I thoroughly agree with his review of the law and his suggestion for the disposition of this motion. The motion to dismiss on the ground of forum non conveniens is granted on condition that (1) defendants submit to the jurisdiction of the English courts; and (2) waive any defense of the statute of limitations as to any claims against them. So ordered—Metzner. m/n.

Docket Entries

- | DATE | PROCEEDINGS |
|---------|---|
| 3-28-74 | Filed Judgment and order dismissing the actions herein, as against (a) Texaco Panama, Inc., on the grounds of forum non conveniens and lack of jurisdiction of the controversy herein, and (b) as to Texaco, Inc., on the grounds that the complaints fail to state a claim upon which relief can be granted and lack of jurisdiction of the controversy herein, etc. Ordered, adjudged and decreed, that defendants have judgment against the plaintiffs, dismissing the complaints on condition (1) defendants submit to the jurisdiction of the English courts; and (2) waive any defense of the statute of limitations as to any claims against them.—Clerk. m/n. |
| 4-5-74 | Filed notice of appeal by plaintiffs' Hapag-Lloyd, A.G. and Stork Amsterdam N.V., et. al. from the Court's final order.—Copies mailed to: Poles Tublin Patestides & Stratakis, Esqs. and Fuchsberg & Fuchsberg, Esqs. |
| 4-5-74 | Filed undertaking for costs on appeal—\$250.00.—National Surety Corp. |
| 4-23-74 | Filed notice of appeal to the USCA for the 2nd Circuit by pltf. Thomas I. Fitzgerald, Public Administrator of the Estate of Hagen Pastewka et. al. from that part of order, dated 3-26-74 and filed on 3-27-74 in all those cases consolidated (72 Civ 5008, 5009, 5010, 73 Civ 92-99, 117, 166 and 182) cases, which dismisses the complaint of plaintiffs—copies mailed to Haight, Gardner, Poor & Havens and to Poles, Tublin, Patestides & Stratakis. |
| 6-3-74 | Filed Stip. for Inclusion of Documents in official Record Pursuant to FRHP Rule 10(e). |

Record

**Brandenburg's Amended Complaint
(73 Civ. 166, SDNY)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 166

HAPAG-LLOYD, A. G., as owner of the M/V BRANDENBURG,
and as bailee of the cargo laden thereon,

Plaintiff,

—against—

TEXACO PANAMA, INC., as owner of the M/V TEXACO
CARIBBEAN,

Defendants.

Plaintiff Hapag-Lloyd A. G., by its attorneys Haight, Gardner, Poor & Havens, for its amended complaint against Texaco Panama, Inc. now shows to this Honorable Court upon information and belief the following:

1. This is an admiralty or maritime claim within the meaning of Rule 9(h) of the Rules of Civil Procedure for the United States District Courts, as hereinafter more fully appears.

2. Plaintiff Hapag-Lloyd A. G. was at the time pertinent to this complaint and now is a corporation duly organized and existing under the laws of the Federal Republic of West Germany; plaintiff brings this action on its own behalf as owner of the German Flag M/V Brandenburg, and as bailee of the cargo laden aboard her at the time of her loss.

3. Defendant Texaco Panama, Inc. was at the times pertinent to this complaint and now is a corporation duly

Brandenburg's Amended Complaint (73 Civ. 166, SDNY)

organized and existing under the laws of the Republic of Panama, with an office and place of business at 135 East 42nd Street, New York, New York 10017, within this District and within the jurisdiction of this Honorable Court.

4. Texaco Panama, Inc. was at the times pertinent to this complaint the owner of the M/V Texaco Caribbean and/or of the wreck of said vessel.

5. Texaco Panama, Inc. had at the times pertinent to this complaint possession and control of the M/V Texaco Caribbean and/or of the wreck of the said vessel.

6. On or about 4:10 A.M. British Standard Time on the morning of January 11, 1971, the M/V Texaco Caribbean collided with the M/V Paracas south of Folkestone and west of The Varne Bank, in the Straits of Dover. Following the collision with M/V Texaco Caribbean was split in two by an explosion. Her bow section filled and sank below the surface of the sea shortly thereafter; her stern section filled more slowly, and sank below the surface of the sea in the evening of January 11, 1971.

7. At and before the time of the collision referred to hereafter in paragraph "8" hereof, the submerged wreck of the M/V Texaco Caribbean:

- i. had not been located; and
- ii. had not been marked or buoyed; and
- iii. constituted an obstruction and a menace to navigation.

8. At or about 0734 January 12, 1971, the M/V Brandenburg, laden with various cargoes valued at about \$800,-

Brandenburg's Amended Complaint (73 Civ. 166, SDNY)

000 and proceeding on a normal voyage from Antwerp to the West Indies, struck the unmarked, submerged Texaco Caribbean and sank shortly thereafter, becoming with her cargoes a total loss.

9. Plaintiff as a result of striking the submerged wreck of the Texaco Caribbean suffered damages, so far as presently ascertained, from total loss of the M/V Brandenburg, with interest thereon as provided by law from the date of the accident, and other losses and expenses (particularly but not exclusively in connection with the locating and marking of the wreck of the Brandenburg), of approximately \$1,250,000.00; and, as bailee of that vessel's cargoes, of approximately \$800,000.00.

Plaintiff may suffer further damages by reason of claims by third parties against it, and reserves the right to amend this complaint to allege other and greater damages if later so advised.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

10. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1." through "9." above, with the same force and effect as though here set out at length.

11. The collision between the M/V Brandenburg and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of plaintiff or those for whose actions plaintiff is accountable, or of the M/V Brandenburg or those in charge of her, but was caused by the wilful and/or negligent failure of defendant to locate said wreck, so as to permit proper buoying or marking thereof.

Brandenburg's Amended Complaint (73 Civ. 166, SDNY)

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

12. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1." through "9." above, with the same force and effect as though here set out at length.

13. The collision between the M/V Texaco Caribbean and M/V Paracas was caused or contributed to by fault, negligence and want of care on the part of the M/V Texaco Caribbean and of her owners and/or those in charge of that vessel.

14. The collision between the M/V Brandenburg and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of plaintiff or those for whose actions plaintiff is accountable, or of the M/V Brandenburg or those in charge of her, but was caused by the wilful and/or negligent failure of defendant to locate said wreck, so as to permit proper buoying or marking thereof.

FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

15. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1. through 9. above, with the same force and effect as though here set out at length.

16. The collision between the M/V Brandenburg and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of plaintiff or those for whose actions plaintiff is accountable, or of the M/V Brandenburg or those in charge of her, but was caused by the wilful and/or negligent failure of defendant to mark or buoy said wreck.

Brandenburg's Amended Complaint (73 Civ. 166, SDNY)

FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

17. Plaintiff repeats and realleges each and every allegation made in paragraphs 1. and 9. hereinabove, with the same force and effect as though here set out at length.

18. The collision between the M/V Texaco Caribbean and the M/V Paracas was caused or contributed to by fault, negligence and want of care on the part of the M/V Texaco Caribbean and of her owners and/or those in charge of that vessel.

19. The collision between the M/V Brandenburg and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of plaintiff or those for whose actions plaintiff is accountable, or of the M/V Brandenburg or those in charge of her, but was caused by the wilful and/or negligent failure of defendant to mark or buoy said wreck.

FOR A FIFTH CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

20. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1." through "9." above, with the same force and effect as though here set out at length.

21. The collision between the M/V Brandenburg and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault on the part of plaintiff or those for whose actions plaintiff is accountable, or of the M/V Brandenburg or those in charge of her, but was caused by the negligent placing of an obstruction and menace to navigation in navigable waters by defendant.

Brandenburg's Amended Complaint (73 Civ. 166, SDNY)

WHEREFORE, plaintiff prays that this Honorable Court may enter judgment in favor of plaintiff and against defendant for the damages hereinabove set forth together with interest and costs and for such other and further or different relief as to this Honorable Court may appear just in the cause.

Yours, Etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs

By /s/ MACDONALD DEMING

A Member of the Firm

One State Street Plaza

New York, New York 10004

212-344-6800

**Brandenburg Cargo's Complaint
(73 Civ. 182 SDNY)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 CIV.

STORK AMSTERDAM N.V.; INDUSTRIAS LACTEAS DOMINICANAS S.A. "INDULAC"; CORNELIS NOORDHOEK; QUINTANA HNOS; INC.; N.V. KONINKLIJKE DISTILLEERDERIJEN "ERVEN LUCAS BOLS" (Formerly N.V. AMSTERDAMSCH E LIKEURSTOKERIJ "'T LOOTSJE' DER ERVEN LUCAS BOLS") J. WRAY AND NEPHEW LTD.; N.V. VERKOOPASSOLIAATIE DER UERENIGDE LIKEURSTOKERIJEN V.U.L.; THE RUM COMPANY (JAMAICA) LTD.; P. VAN LEEUWEN JR.'S BUIZEJHANDEL N.V.; NOOYEN N.V.; HANDELSONDERNEMING "OKAHNI" N.V.; KOOLJMAN'S AGENCIES INC.; OVERSEAS CONSTRUCTION COMPANY; OVERSEAS CONSTRUCTION COMPANY CARIBBEAN, LTD.; KONINKLIJKE NEDERLANDSE MAATSCHAPPIJ VOOR HAVENWERKEN N.V.; NETHERLANDS HARBOUR WORKS COMPANY (NETHERLANDS ANTILLES) N.V.; ANTEM N.V.; BOGENA N.V.; PET CARE, N.V.; N.V. MADURO INTERMAVEN; S.E.L. MADURO AND SONS LTD.; LAGENDIJK'S POETSKATOEN—EN POETSLAPPEN—FABRIKEN N.V.; CARLOS C. JESURUM AND CO.; LA CITRIQUE BELGE S.A.; RAPID SALES COMPANY LTD.; ZEMENT EXPORT RHEINWEST G.M.B.H.; A.G. "WESER" SEE—BECKWERFT; MATAB N.V.; and VIHAMIJ BUTTINGER N.V.,

Plaintiffs,

—against—

TEXACO PANAMA, INC. as owner of the M/V TEXACO CARIBBEAN,

Defendant.

Plaintiffs herein, by their attorneys Haight, Gardner, Poor & Havens, for their complaint against Texaco Pan-

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

ama, Inc. now show to this Honorable Court upon information and belief the following:

1. This is an admiralty or maritime claim within the meaning of Rule 9(h) of the Rules of Civil Procedure for the United States District Courts, as hereinafter more fully appears.

2. At the times pertinent to this complaint, plaintiffs were either foreign nationals, or were duly organized corporations, individual proprietorships or other business entities, and were residents of, or existed under and by virtue of the laws of, the countries set out in schedules A-V annexed hereto, with offices and places of business and locations as appear in said schedules.

3. Defendant Texaco Panama, Inc. was at the times pertinent to this complaint and now is a corporation duly organized and existing under the laws of the Republic of Panama, with an office and place of business at 135 East 42nd Street, New York, New York 10017, within this District and within the jurisdiction of this Honorable Court.

4. Texaco Panama, Inc. was at the times pertinent to this complaint the owner of the M/V Texaco Caribbean and/or of the wreck of said vessel.

5. Texaco Panama, Inc. had at the times pertinent to this complaint possession and control of the M/V Texaco Caribbean and/or of the wreck of said vessel.

6. On or about the dates and at the ports named in annexed schedules A-V, there were loaded aboard the M/V Brandenburg various cargoes (more fully described in said schedules) in good order and condition, for carriage by sea to various ports (more fully described in said schedules),

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

together with other cargoes which were also in good order and condition; laden with said cargoes, the M/V Brandenburg broke ground at Antwerp on or about January 11, 1971, and made course for the West Indies.

7. On or about 4:10 A.M. British Standard Time on the morning of January 11, 1971, the M/V Texaco Caribbean collided with the M/V Paracas south of Folkestone and west of The Varne Bank, in the Straits of Dover. Following the collision, the M/V Texaco Caribbean was split in two by an explosion. Her bow section filled and sank below the surface of the sea shortly thereafter; her stern section filled more slowly, and sank below the surface of the sea in the evening of January 11, 1971.

8. At and before the time of the collision referred to hereafter in paragraph "8" hereof, the submerged wreck of the M/V Texaco Caribbean:

- i. had not been located;
- ii. had not been marked or buoyed; and
- iii. constituted an obstruction and a menace to navigation.

9. At or about 0734 January 12, 1971, while proceeding on a normal voyage from Antwerp to the West Indies, the M/V Brandenburg ran upon the unmarked, submerged wreck of the M/V Texaco Caribbean and sank shortly thereafter, causing plaintiffs' and all other shipments of cargo laden aboard her to become of no value, and lost.

10. Plaintiffs were shippers, consignees or owners of the shipments described in annexed schedules A-V, or were possessed of other rights to and in said shipments, and

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

bring this action on their behalf and as agents, assignees and trustees on behalf of, and for the interest of all parties who may be or become interested in said shipments, and/or in all other shipments of cargo laden onboard the M/V Brandenburg at the time of her loss as their respective interests may ultimately appear, and plaintiffs are entitled to maintain this action.

11. Plaintiffs have duly performed all of their duties and obligations on their part to be performed.

12. Plaintiffs have sustained damages by reason of the loss of their cargoes, and otherwise resulting from said casualty in the total amount of \$450,000, as nearly as may now be estimated, including but not limited to the particular losses set out in schedules A-V annexed hereto, no part of which has been paid, although duly demanded. Plaintiffs reserve their rights to amend their complaint to allege other and greater damages if later so advised.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

13. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1." through "12." above, with the same force and effect as though here set out at length.

14. The loss of all cargo laden aboard the M/V Brandenburg following the collision between her and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of plaintiffs, but was caused by the willful and/or negligent failure of defendant to locate said wreck, so as to permit proper buoying or marking thereof.

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

15. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1." through "12." above, with the same force and effect as though here set out at length.

16. The collision between the M/V Texaco Caribbean and M/V Paracas was caused or contributed to by fault, negligence and want of care on the part of the M/V Texaco Caribbean and of her owners and/or those in charge of that vessel.

17. The loss of all cargo laden onboard the M/V Brandenburg following the collision between her and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of the plaintiffs, but was caused by the wilful and/or negligent failure of defendant to locate said wreck, so as to permit proper buoying or marking thereof.

FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

18. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1." through "12." above, with the same force and effect as though here set out at length.

19. The loss of all cargo laden onboard the M/V Brandenburg following the collision between her and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of plaintiffs, but was caused by the wilful and/or negligent failure of defendant to mark or buoy said wreck.

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

20. Plaintiffs repeat and reallege each and every allegation made in paragraphs "1." through "12." above, with the same force and effect as though here set out at length.

21. The collision between the M/V Texaco Caribbean and the M/V Paracas was caused or contributed to by fault, negligence and want of care on the part of the M/V Texaco Caribbean and of her owners and/or those in charge of that vessel.

22. The loss of all cargo laden onboard the M/V Brandenburg following the collision between her and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault of plaintiffs, but was caused by the wilful and/or negligent failure of defendant to mark or buoy said wreck.

FOR A FIFTH CAUSE OF ACTION AGAINST DEFENDANT
TEXACO PANAMA, INC.

23. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1." through "12." above, with the same force and effect as though here set out at length.

24. The loss of all cargo laden onboard the M/V Brandenburg following the collision between her and the submerged wreck of the M/V Texaco Caribbean was not caused by any fault on the part of plaintiffs, but was caused by the negligent placing of an obstruction and menace to navigation in navigable waters by defendant.

WHEREFORE, plaintiffs pray that this Honorable Court may enter judgment in favor of plaintiffs and against de-

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

fendant for the damages hereinabove set forth, together with interest and costs, and providing for such other, further or different relief as to this Honorable Court may appear just in the cause.

Yours, etc.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs

By /s/ MACDONALD DEMING

A Member of the Firm

One State Street Plaza

New York, New York 10004

212-344-6800

SCHEDULE A

Cause of action on behalf of Plaintiffs Stork Amsterdam N.V. and Industrias Lacteas Dominicanas S.A. "INDULAC"

Stork Amsterdam N.V. and Industrias Lacteas Dominicanas S.A. "INDULAC"—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and Dominican Republic, with an office and place of business in

Sportlaan 198, Amstelveen
Calle Dr Delgado 22, Santo Domingo, respectively.

1. Seller: Stork Amsterdam, N.V.
Sportlaan 198, Amstelveen
2. Bill of Lading: A-1 Amsterdam, 8th January 1971

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

3. Description of Goods: 20 cases. 13 drums and 1 crate machineries to construct a factory for making milk-powder and condensed milk.
4. Port of Loading: Rotterdam
5. Port of Destination: Santo Domingo
6. Buyer: Industrias Lacteas Dominicanas S.A. "INDULAC", Calle Dr. Delgado 22, Santo Domingo
7. Term of Delivery: F.O.B. Rotterdam
8. Damage Amount: Dfls. 539.156.25.

SCHEDULE B

Cause of action on behalf of Plaintiffs Cornelias Noordhoek and Quintana Hnos., Inc.

Cornelis Noordhoek and Quintana Hnos., Inc.—were and now are corporations duly organized and existing under and by virtue of the laws of Holland Puerto Rico, with an office and place of business in

Burgemeester Van Dobben de
Bruinstraat 6, Bodegraven, and
Calle Comercio 350, San Juan,
Puerto Rico, respectively.

1. Seller: Cornelis Noordhoek
2. Bill of Lading: Nr. 6, Rotterdam, 8th January 1971
3. Description of Goods: 1534 Cartons cheeses
4. Port of Loading: Rotterdam
5. Port of Destination: San Juan (P.R.)
6. Buyer: Quintana Hnos, Inc.
7. Term of Delivery: C.I.F. San Juan
8. Damage Amount: Dfls. 64,663.20.

*Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)***SCHEDULE C**

Cause of action on behalf of plaintiffs N.V. Koninklijke Distilleerderijen "Erven Lucas Bols", (formerly N.V. Amsterdamsche Likeurstokerij "T Lootsje" der Erven Lucas Bols and J. Wray and Nephew Ltd.

N.V. Koninklijke Distilleerderijen "Erven Lucas Bols" and J. Wray and Nephew Ltd.—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and British West Indies, with an office and place of business in

Lucas Bolsstraat 7, Nieuw Vennep
and 234 Spanish Town Road,
Kingston-11, Jamaica, respectively.

1. Seller: N.V. Koninklijke Distilleerderijen "Erven Lucas Bols"
2. Bill of Lading: Nr. A-1, Amsterdam, 8th January 1971
3. Description of Goods: 8130 cartons empty bottles, 18 buckets viscose rings, 1 carton viscose rings and 43 cartons stoppers
4. Port of Loading: Rotterdam
5. Port of Destination: Kingston
6. Buyer: J. Wray and Nephew Ltd.
7. Term of Delivery: C.I.F. Kingston
8. Damage Amount: Dfls. 113.353.—

SCHEDULE D

Cause of action on behalf of plaintiffs N.V. Verkoop-associatie der Verenigde Likeurstokerijen V.V.L. and The Rum Company (Yamaica) Ltd.

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

N.V. Verkoopassociatie der Verenigde Likeurstokerijen V.V.L. and The Rum Company (Yamaica) Ltd.—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and British, with an office and place of business in West Indies

Lucas Bolsstraat 7, Nieuw Vennepe
and 234 Spanish Town Road,
Kingston-11, Jamaica, respectively.

1. Seller: N.V. Verkoopassociatie der Verenigde Likeurstokerijen V.V.L.
2. Bill of Lading: Nr. A-2, Rotterdam, 8th January 1971
3. Description of Goods: 23 drums esprit liqueurs and 1 carton colouring matter
4. Port of Loading: Rotterdam
5. Port of Destination: Kingston
6. Buyer: The Rum Company (Yamaica) Ltd.
7. Term of Delivery: C.I.F. Kingston
8. Damage Amount: Dfls. 19,395.—

SCHEDULE E

Cause of action on behalf of plaintiffs N.V. Koninklijke Distilleerderijen Erven Lucas Bols (formerly N.V. Amsterdamsche Likeurstokerij " 't Lootsje" der Erven Lucas Bols) and J. Wray and Nephew Ltd.

N.V. Koninklijke Distilleerderijen Erven Lucas Bols and J. Wray and Nephew Ltd.—were and now are corporations duly organized and existing under and by virtue of the

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

laws of Holland and British West Indies, with an office and place of business in

Lucas Bolsstraat 7, Nieuw Vennep
and 234 Spanish Town Road,
Kingston-11, Jamaica, respectively.

1. Seller: N.V. Koninklijke Distilleerderijen Erven Lucas Bols.
2. Bill of Lading: Nr. A-3, Rotterdam, 8th January 1971
3. Description of Goods: 525 cartons empty bottles, 4 cases labels and 1 bucket capsules
4. Port of Loading: Rotterdam
5. Port of Destination: Willenstad (Curacao)
6. Buyer: J. Wray and Nephew Ltd.
7. Term of Delivery: C.I.F. Kingston
8. Damage Amount: Dfls. 45,014.—

SCHEDULE F

Cause of action on behalf of Plaintiffs P. van Leeuwen Jr.'s
Buizenhandel N.V. and Nooyen N.V.

P. van Leeuwen Jr.'s Buizenhandel N.V. and Nooyen N.V.
—were and now are corporations duly organized and exist-
ing under and by virtue of the laws of Holland and the
Dutch Antilles, with an office and place of business in

Lindtsedijk 20, Zwijndrecht and
F.D. Rooseveltweg 64, Willemstad,
Curacao, respectively.

1. Seller: P. Van Leeuwen Jr.'s Buizenhandel N.V.
2. Bill of Lading: Nr. 12, Rotterdam 8th January 1971

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

3. Description of Goods: 11 Bundles containing 701 pieces and one other 200 pieces welded steel tubes
4. Port of Loading: Rotterdam
5. Port of Destination: Willenstad (Curacao)
6. Buyer: Nooyen N.V.
7. Term of Delivery: C.I.F. Willemstad
8. Damage Amount: Dfls. 11,350.—

SCHEDULE G

Cause of action on behalf of Plaintiffs: Handelsonderneming "OKAHNI" N.V. and Kooijman's Agencies Inc.

Handelsonderneming "OKAHNI" N.V. and Kooijman's Agencies, Inc.—were and now are corporations duly organized and existing under and by virtue of the laws of Belgium or Holland and the Dutch Antilles, with an office and place of business in

Sesweelingeklaan 23, Bilthoven;
and Architectenweg 42, Willemstad,
Curacao, respectively.

1. Seller: Handelsonderneming "OKAHNI" N.V.
2. Bill of Lading: Nr. 2, Antwerp, 11th January 1971
3. Description of Goods: 1 case glass
4. Port of Loading: Antwerp
5. Port of Destination: Willemstad (Curacao)
6. Buyer: Kooijman's Agencies Inc.
7. Term of Delivery: C.I.F. Willenstad
8. Damage Amount: B.frcs. 23,423.—

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SCHEDULE H

Cause of action on behalf of Plaintiffs Handelsonderneming
"OKAHNI" N.V. and Kooijman's Agencies Inc.

Handelsonderneming "OKAHNI" N.V. and Kooijman's
Agencies Inc.—were and now are corporations duly organ-
ized and existing under and by virtue of the laws of Belgium
or Holland and the Dutch Antilles, with an office and place
of business in

Sesweelingcklaan 23, Bilthoven
and Architectenweg 42, Willemstad,
Curacao, respectively.

1. Seller: Handelsonderneming "OKAHNI" N.V.
2. Bill of Lading: Nr. 9, Antwerp, 11th January 1971
3. Description of Goods: 27 Bundles galvanised corru-
gated sheets
4. Port of Loading: Antwerp
5. Port of Destination: Willemstad
6. Buyer: Kooijman's Agencies Inc.
7. Term of Delivery: Unknown
8. Damage Amount: B.frcs. 253,480.—

SCHEDULE I

Cause of action on behalf of Plaintiffs Handelsonderneming
"OKAHNI" N.V. and Kooijman's Agencies Inc.

Handelsonderneming "OKAHNI" N.V. and Kooijman's
Agencies Inc.—were and now are corporations duly organ-
ized and existing under and by virtue of the laws of Belgium
or Holland and the Dutch Antilles, with an office and place
of business in

Sesweelingcklaan 23, Bilthoven
and Architectenweg 42, Willemstad,
Curacao, respectively.

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

1. Seller Handelsonderneming "OKAHNI" N.V.
2. Bill of Lading: Nr. 11, Rotterdam, 8th January 1971
3. Description of Goods: 1 container textile goods
4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Kooijman's Agencies Inc.
7. Term of Delivery: C.I.F. Willemstad
8. Damage Amount: Dfls. 23.265.—

SCHEDULE J

Cause of action on behalf of Plaintiffs Handelsonderneming "OKAHNI" N.V. and Kooijman's Agencies Inc.

Handelsonderneming "OKAHNI" N.V. and Kooijman's Agencies Inc.—were and now are corporations duly organized and existing under and by virtue of the laws of Belgium or Holland and the Dutch Antilles, with an office and place of business in

Sesweelingcklaan 23, Bilthoven
and Architectenweg 42, Willemstad,
Curacao, respectively.

1. Seller Handelsonderneming "OKAHNI" N.V.
2. Bill of Lading: Nr. 5, Rotterdam, 8th January 1971
3. Description of Goods: 2 packages plastic sheets
4. Port of Destination: Willemstad
6. Buyer: Kooijman's Agencies Inc.
7. Term of Delivery: C.I.F. Willemstad
8. Damage Amount: Dfls. 1.155.—

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

SCHEDULE K

Cause of action on behalf of Plaintiffs Handelsonderneming
"OKAHNI" N.V. and Kooijman's Agencies Inc.

Handelsonderneming "OKAHNI" N.V. and Kooijman's
Agencies Inc.—were and now are corporations duly organ-
ized and existing under and by virtue of the laws of Belgium
or Holland and the Dutch Antilles, with an office and place
of business in

Sesweelingcklaan 23, Bilthoven
and Architectenweg 42, Willemstad,
Curacao, respectively.

1. Seller Handelsonderneming "OKAHNI" N.V.
2. Bill of Lading: Nr. 8, Rotterdam 8th January 1971
3. Description of Goods: 2 cases aluminium strips
4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Kooijman's Agencies Inc.
7. Term of Delivery: C.I.F. Willemstad
8. Damage Amount: Dfls. 2.147,—

SCHEDULE L

Cause of action on behalf of Plaintiffs Handelsonderneming
"OKAHNI" N.V. and Kooijman's Agencies Inc.

Handelsonderneming "OKAHNI" N.V. and Kooijman's
Agencies Inc.—were and now are corporations duly organ-
ized and existing under and by virtue of the laws of Belgium
or Holland and the Dutch Antilles, with an office and place
of business in

Sesweelingcklaan 23, Bilthoven
and Architectenweg 42, Willemstad,
Curacao, respectively.

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

1. Seller Handelsonderneming "OKAHNI" N.V.
2. Bill of Lading: Nr. 3, Rotterdam, 8th January 1971
3. Description of Goods: 1 case school necessities
4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Kooijman's Agencies Inc.
7. Term of Delivery: C.I.F. Willemstad
8. Damage Amount: Dfls. 700.—

SCHEDULE M

Cause of action on behalf of Plaintiffs Handelsonderneming "OKAHNI" N.V. and Kooijman's Agencies Inc.

Handelsonderneming "OKAHNI" N.V. and Kooijman's Agencies Inc.—were and now are corporations duly organized and existing under and by virtue of the laws of Belgium or Holland and the Dutch Antilles, with an office and place of business in

Sesweelingeklaan 23, Bilthoven
and Architectenweg 42, Willemstad,
Curacao, respectively.

1. Seller Handelsonderneming "OKAHNI" N.V.
2. Bill of Lading: Nr. 6, Rotterdam, 8th January 1971
3. Description of Goods: 1 case school necessities
4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Kooijman's Agencies Inc.
7. Term of Delivery: C.I.F. Willemstad
8. Damage Amount: Dfls. 305.—

*Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)***SCHEDULE N**

Cause of action on behalf of Plaintiffs Overseas Construction Company and/or Zementexport Rheir.-West G.m.b.H and Overseas Construction Company Caribbean Ltd.

Overseas Construction Company*—were and now are corporations duly organized and existing under and by virtue of the laws of Holland, and/or Germany and Dutch Antilles, with an office and place of business in

A.J. Ernststraat 3, Amsterdam**

1. Seller: Overseas Construction Company and/or Zementexport Rhein-West G.m.b.H.
2. Bill of Lading: Nr. 1, Rotterdam, 8th January 1971
3. Description of Goods: 20,000 bags cement
4. Port of Loading: Bremen
5. Port of Destination: Willemstad
6. Buyer: Overseas Construction Company Caribbean Ltd.
7. Term of Delivery: F.O.B. Bremen
8. Damage Amount: Dfls. 97,340.—

* and/or Zementexport Rhein-West G.m.b.H. and Overseas Construction Company Caribbean Ltd.

** Wilhelmstrasse 98, Beckum (West, Germany) and Parera, Wilemstad, respectively.

SCHEDULE O

Cause of action on behalf of Plaintiffs Koninklijke Nederlandse Maatschappij voor Havenwerken N.V. and/or

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

A.G. Wester Seebeckwerft, Bremerhaven and Netherlands Harbour Works Company (Netherlands Antilles) N.V.

Koninklijke Nederlandse Maatschappij voor Havenwerken N.V. and/or*—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and/or Germany and Dutch Antilles, with an office and place of business in

A.J. Ernststraat 3, Amsterdam**

1. Seller: Koninklijke Nederlandse Maatschappij voor Havenwerken N.V. and/or A.G. Weser Seebeckwerft
2. Bill of Lading: Nr. 15, Rotterdam, 8th January 1971
3. Description of Goods: 82 packages construction parts
4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Netherlands Harbour Works Company (Netherlands Antilles) N.V.
7. Term of Delivery: Unknown
8. Damage Amount: Dfls. 75,500.—

* A. G. Weser Seebeckwerft, Bremerhaven and Netherlands Harbour Works Company (Netherlands Antilles) N.V.

** Bremerhaven and Parera, Willemstad, respectively.

SCHEDULE P

Cause of action on behalf of Plaintiffs Koninklijke Nederlandse Maatschappij voor Havenwerken N.V. and/or Matab N.V. and Netherlands Harbour Works Company (Netherlands Antilles) N.V.

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

Koninklijke Nederlandse Maatschappij voor Havenwerken N.V.*—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and/or Germany and Dutch Antilles, with an office and place of business in

A.J. Ernststraat 3, Amsterdam**

1. Seller: Koninklijke Nederlandse Maatschappij voor Havenwerken N.V. and/or Matab N.V.
2. Bill of Lading: Nr. 15, Rotterdam, 8th January 1971
3. Description of Goods: 17 cases construction parts
4. Port of Loading: Bremen
5. Port of Destination: Willemstad
6. Buyer: Netherlands Harbour Works Company (Netherlands Antilles) N.V.
7. Term of Delivery: Unknown
8. Damage Amount: Dfls. 49,000.—

* Matab N.V. and Netherlands Harbour Works Company (Netherlands Antilles) N.V.

** Groenendijk 39 A, Nieuwerkert A'/D Ijssel and Parera, Willemstad, respectively.

SCHEDULE Q

Cause of action on behalf of Plaintiffs Koninklijke Nederlandse Maatschappij voor Havenwerken N.V. and/or Vihamij Buttinger N.V. and Antem, N.V.

Koninklijke Nederlandse Maatschappij voor Havenwerken N.V.*—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and/or

* and/or Vihamij Buttinger N.V. and Untem N.V.

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

Germany and Dutch Antilles, with an office and place of business in

A.J. Ernststraat 3, Amsterdam**

1. Seller: Koninklijke Nederlandse Maatschappij voor Havenwerken N.V. and/or Vihamij Buttinger N.V.
2. Bill of Lading: Nr. 16, Rotterdam, 8th January 1971.
3. Description of Goods: 5 cases nuts
4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Antem N.V.
7. Term of Delivery: Unknown
8. Damage Amount: Dfls. 7.225.—

** Zuilingstraat 22-24, The Hague and Pletterijweg (Parera), Willemstad, respectively.

SCHEDULE R

Cause of action on behalf of Plaintiffs Bogena N.V. and Pet Care

Bogena N.V. and Pet Care—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and Dutch Antilles, with an office and place of business in

Veerlaan 17-23, Rotterdam and
Aurigaweg 3, Willemstad,
respectively.

1. Seller: Bogena N.V.
2. Bill of Lading: Nr. 2, Rotterdam, 8th January 1971
3. Description of Goods: 33 bags cattlefeed

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Pet Care
7. Term of Delivery: F.O.B. Rotterdam
8. Damage Amount: Dfls. 1.092.—

SCHEDULE S

Cause of action on behalf of Plaintiffs N.V. Maduro Intermaven and S.E.L. Maduro and Sons Ltd.

N.V. Maduro Intermaven and S. E. L. Maduro and Sons Ltd.—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and Dutch Antilles, with an office and place of business in

Noordeinde 136A, The Hague and
Emancipatie Boulevard, Willemstad,
respectively.

1. Seller: N.V. Maduro Intermaven
2. Bill of Lading: Nr. 7, Antwerp, 5th January 1971
3. Description of Goods: 217 Bundles reinforcing bars
4. Port of Loading: Bremen
5. Port of Destination: Willemstad
6. Buyer: S.E.L. Maduro and Sons Ltd.
7. Term of Delivery: C & F Willemstad
8. Damage Amount: N.A.Fl. 73,418.70

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

SCHEDULE T

Cause of action on behalf of Plaintiffs Lagendijk's Poetskatoen- en Poetslappen-Fabrieken N.V. and Carlos L. Jesurum and Co.

Lagendijk's Poetskatoen- en Poetslappen-Fabrieken N.V. and Carlos L. Jesurum and Co.—were and now are corporations duly organized and existing under and by virtue of the laws of Holland and Dutch Antilles, with an office and place of business in

Loggerstraat 19, Ijmuiden and
Madurostraat 31/32, Willemstad,
respectively.

1. Seller: Lagendijk's Poetskatoen- en Poetslappen-Fabrieken N.V.
2. Bill of Lading: Nr. A 2, Amsterdam, 8th January 1971
3. Description of Goods: 10 bales cleaning waste and 40 bales wiping rags
4. Port of Loading: Rotterdam
5. Port of Destination: Willemstad
6. Buyer: Carlos L. Jesurum and Co.
7. Term of Delivery: C.I.F. Willemstad
8. Damage Amount: Dfls. 4.700.—

SCHEDULE U

Cause of action on behalf of Plaintiffs La Citrique Belge S.A. and Rapid Sales Company Ltd.

La Citrique Belge S.A. and Rapid Sales Company Ltd.—were and now are corporations duly organized and existing

Brandenburg Cargo's Complaint (73 Civ. 182 SDNY)

under and by virtue of the laws of Belgium and the British West Indies, with an office and place of business in

Pastorijstraat 249, Tienen,
Belgium and 187 Hagley Park Road,
11-Kingston, Jamaica, respectively.

1. Seller: La Citrique Belge S.A.
2. Bill of Lading: Nr. 1, Antwerp, 11th January 1971
3. Description of Goods: 40 bags citric acid
4. Port of Loading: Antwerp
5. Port of Destination: Kingston (Jamaica)
6. Buyer: Rapid Sales Company Ltd.
7. Term of Delivery: C.I.F. Kingston
8. Damage Amount: Pound sterling 630.—.

**Decedent Pastewka's Complaint (72 Civ. 5008 SDNY),
as representative of and identical to the complaints in
SDNY actions 72 Civ. 5009 and 5010, and
73 Civ. 92-99 and 116***

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS I. FITZGERALD, Public Administrator of the County
of New York, Administrator of the Estate of HAGEN
PASTEWKA, Deceased and MONICA PASTEWKA,
Individually,

Plaintiffs,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants.

PLAINTIFFS DEMAND A TRIAL BY JURY SEAMAN'S
ACTION UNDER 28 U.S.C. 1916, FOR NON-PREPAY-
MENT OF COSTS FOR THE HEALTH AND SAFETY OF
SEAMEN

Plaintiffs, complaining of the defendants by attorneys,
HARVEY GOLDSTEIN and FUCHSBERG & FUCHSBERG, state
and allege upon information and belief as follows:

FOR A FIRST CAUSE OF ACTION

FIRST: This is an action within the admiralty and
maritime jurisdiction of this Court, within the meaning of
Rule 9(h) of the Federal Rules of Civil Procedure.

* Texaco counsel, although they do not agree to the italicized
words, nonetheless "have in no way objected to or tried to change"
them. Texaco counsel's letter of 9 July 74 to Vessel and Cargo
counsel.

Decedent Pastewka's Complaint (72 Civ. 5008 SDNY)

SECOND: Prior to this date, Letters of Administration for the Estate of Hagen Pastewka were granted to the Public Administrator of the County of New York, City and State of New York.

THIRD: At all times hereinafter mentioned, the defendant, Texaco, Inc. was and still is a corporation, incorporated in the State of Delaware.

FOURTH: At all times hereinafter mentioned, said defendant, Texaco, Inc. was and still is licensed to do business in the State of New York.

FIFTH: At all times hereinafter mentioned, said defendant, Texaco, Inc. had and still has a principal office and place of business in the County of New York, City and State of New York.

SIXTH: At all times hereinafter mentioned, said defendant, Texaco, Inc. was and still is in the business of shipping cargo between ports and between nations.

SEVENTH: At all times hereinafter mentioned, said defendant Texaco, Inc. was and still is doing business from its office and principal place of business in New York County, City and State of New York.

EIGHTH: At all times hereinafter mentioned, the defendant Texaco Panama, Inc. was and still is a corporation incorporated outside the State of New York.

NINTH: At all times hereinafter mentioned, said defendant Texaco Panama, Inc. was and still is licensed to do business in the State of New York.

Decedent Patewka's Complaint (72 Civ. 5008 SDNY)

TENTH: At all times hereinafter mentioned, said defendant, Texaco Panama, Inc. had and still has a principal office and place of business in the County of New York, City and State of New York.

ELEVENTH: At all times hereinafter mentioned, said defendant, Texaco Panama, Inc. is in the business of shipping cargo between ports and between nations.

TWELFTH: At all times hereinafter mentioned, said defendant, Texaco Panama, Inc. was doing business from its principal place of business in New York County, City and State of New York.

THIRTEENTH: By reason of the foregoing diversity of citizenship and by reason of the fact that this matter involves a sum in excess of ten thousand (\$10,000) dollars, exclusive of interests and costs, this Honorable Court has jurisdiction herein.

FOURTEENTH: At all times hereinafter mentioned, there was in force and effect the non-statutory general maritime law, which law was and is applicable hereto.

FIFTEENTH: At all times hereinafter mentioned, there was in force and effect certain provisions of the Jones Act, 46 U.S.C. 688, which provisions are applicable hereto.

SIXTEENTH: At all times hereinafter mentioned, there was in force and effect certain provisions of the Death on the High Seas by Wrongful Act, 46 U.S.C. 761, et. seq., which provisions are applicable hereto.

SEVENTEENTH: At all times hereinafter mentioned, there was in force and effect the Wrongful Death Act of the

Decedent Patewka's Complaint (72 Civ. 5008 SDNY)

State of New York, E, P & TL, 5-4.1, et. seq., which act is applicable hereto.

EIGHTEENTH: At all times hereinafter mentioned, defendant Texaco Panama, Inc. was and still is a subsidiary corporation, wholly or substantially under the control of the parent corporation, defendant, Texaco, Inc.

NINETEENTH: At all times hereinafter mentioned, defendant Texaco Panama, Inc. was owned by defendant Texaco, Inc.

TWENTIETH: At all times hereinafter mentioned, defendant, Texaco Panama, Inc. was operated by defendant, Texaco, Inc.

TWENTY-FIRST: At all times hereinafter mentioned, defendant, Texaco Panama, Inc. was managed by defendant, Texaco, Inc.

TWENTY-SECOND: At all times hereinafter mentioned, defendant Texaco Panama, Inc. was controlled by defendant Texaco, Inc.

TWENTY-THIRD: At all times hereinafter mentioned, defendant Texaco, Inc. owned a certain vessel known as the "Texaco Caribbean".

TWENTY-FOURTH: At all times hereinafter mentioned, there was in force and effect a charter party agreement by and between defendants Texaco, Inc. and Texaco Panama, Inc. for the aforesaid vessel.

TWENTY-FIFTH: At all times hereinafter mentioned, defendant Texaco, Inc. operated the aforesaid vessel.

TWENTY-SIXTH: At all times hereinafter mentioned, defendant Texaco, Inc. managed the aforesaid vessel.

Decedent Patewka's Complaint (72 Civ. 5008 SDNY)

TWENTY-SEVENTH: At all times hereinafter mentioned, defendant Texaco, Inc. controlled the aforesaid vessel.

TWENTY-EIGHTH: At all times hereinafter mentioned, defendant Texaco, Inc. manned and victualled the aforesaid vessel.

TWENTY-NINTH: At all times hereinafter mentioned, defendant Texaco Panama, Inc. owned a certain vessel known as the "Texaco Caribbean."

THIRTIETH: At all times hereinafter mentioned, defendant Texaco Panama, Inc. operated the aforesaid vessel.

THIRTY-FIRST: At all times hereinafter mentioned, defendant Texaco Panama, Inc. managed the aforesaid vessel.

THIRTY-SECOND: At all times hereinafter mentioned, defendant Texaco Panama, Inc. controlled the aforesaid vessel.

THIRTY-THIRD: At all times hereinafter mentioned, defendant Texaco Panama, Inc. manned and victualled the aforesaid vessel.

THIRTY-FOURTH: At all times hereinafter mentioned, the decedent was employed aboard the M/S "Brandenburg" as a member of its crew.

THIRTY-FIFTH: On or about January 12, 1971, while the decedent was engaged in the course of his employment aboard the aforesaid vessel, and the vessel was properly and lawfully sailing and situate in the English Channel, it was suddenly and without notice or warning caused to come into a forceful and violent collision with the hull section of the

Decedent Patewka's Complaint (72 Civ. 5008 SDNY)

"Texaco Caribbean", all of which was wholly and solely caused by the negligence of the defendants and each of them, jointly and separately, and by their failure to maintain the said vessel in a seaworthy condition.

THIRTY-SIXTH: By reason of the foregoing the decedent was caused to sustain severe, painful and permanent injuries and mental anguish prior to his death, and the decedent was further injured, all to his damage in the sum of five hundred thousand (\$500,000.00) dollars.

FOR A SECOND CAUSE OF ACTION

THIRTY-SEVENTH: Plaintiff repeats and realleges all of the foregoing allegations contained in the paragraphs of the First Cause of Action of the complaint herein with the same force and effect as if herein set forth at length and, in addition thereto, alleges:

THIRTY-EIGHTH: The decedent died on or about January 12, 1971 as a result of the aforesaid facts.

THIRTY-NINTH: Said decedent left him surviving his heirs at law, next-of-kin, and dependents, who were dependent upon him and who have been deprived of his contributions, support, care, guidance, love, affection and services; and have been caused to expend sums of money resulting from the death of the decedent.

FOURTEENTH: As a result thereof the heirs at law, next-of-kin and dependents of said decedent have been damaged in the sum of one million (\$1,000,000.00) dollars.

FOR A THIRD CAUSE OF ACTION IN BEHALF OF
MONICA PASTEWKA

FORTY-FIRST: Plaintiff repeats and realleges all of the foregoing allegations contained in the paragraphs of the

Decedent Patewka's Complaint (72 Civ. 5008 SDNY)

First and Second Causes of Action of the complaint herein with the same force and effect as if herein set forth at length and, in addition thereto, alleges:

FORTY-SECOND: Prior to and at the time of the death of the decedent, this plaintiff was the lawful wife of the decedent and duly cohabited with him.

FORTY-THIRD: The aforesaid occurrence was not caused or contributed to by the plaintiff.

FORTY-FOURTH: As a result thereof, the plaintiff has suffered a loss of consortium and the continuation of said marital relationship, loss of sexual fulfillment, conjugal fellowship, companionship, love, affection, services; and the plaintiff suffered mental and emotional anguish, all to her damage in the sum of two hundred thousand (\$200,000.00) dollars.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, jointly and separately, in the sum of five hundred thousand (\$500,000.00) dollars in the First Cause of Action, in the sum of One million (\$1,000,000.00) dollars in the Second Cause of Action, and in the sum of two hundred thousand (\$200,000.00) dollars in the Third Cause of Action, together with the costs and disbursements of this action.

HARVEY GOLDSTEIN
FUCHSBERG & FUCHSBERG

By: /s/ HARVEY GOLDSTEIN
Office & P.O. Address
250 Broadway
New York, New York 10007
(212) 962-2800

**Texaco Defendants' Motion of 2 Mar. 73
to dismiss all cases**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
72 Civ. 5008 (CMM)

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE
COUNTY OF NEW YORK, ADMINISTRATOR OF THE ESTATE
OF HAGEN PASTEWKA, DECEASED and MONICA PAS-
TEWKA, INDIVIDUALLY, et al

Plaintiffs,

—against—

TEXACO INC. and TEXACO PANAMA INC.,

Defendants.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed Affidavits of Alvin L. Stern, sworn to on the 28th day of February, 1973, Robert R. Dimock, sworn to on the 6th day of February, 1973, E. F. Pointon, sworn to on the 5th day of February, 1973, Cedric G. Harris, sworn to on the 2nd day of February, 1973 and William J. Clayton, sworn to on the 16th day of February, 1973, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at Room 2201, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 14th day of March, 1973 at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to Rules 12 and 56, Federal Rules of Civil Procedure dismissing the actions herein, as against (a) Texaco Panama Inc., on the grounds of *forum non conveniens* and

Texaco Defendants' Motion of 2 Mar. 73 to dismiss all cases

lack of jurisdiction of the controversy herein, and (b) as to Texaco Inc., on the grounds that the complaints fail to state a claim upon which relief can be granted and lack of jurisdiction of the controversy herein.

Dated: New York, New York
March 2, 1973.

Yours etc.

POLES, TUBLIN, PATESTIDES & STRATKIS

By: /s/ ALVIN L. STERN

Member of the Firm

Attorneys for Defendants

37 Wall Street

New York, New York 10005

Tel. No.: 944-0580

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One State Street Plaza

New York, New York 10004

**Affidavit of Alvin L. Stern in Support of Motion to
Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALVIN L. STERN, being duly sworn, deposes and says:

1. That I am a member of the firm of POLES, TUBLIN, PATESTIDES & STRATAKIS, attorneys for the defendants herein and am familiar with all the pleadings and proceedings heretofore had in this matter.

2. That this Affidavit is submitted in support of defendants' Motion seeking to dismiss the actions herein (A) as to Texaco Panama Inc., on the ground of *forum non conveniens* in that these actions should properly be heard in the Courts of England and further that this Court lacks jurisdiction of the controversy herein, and (B) as to Texaco Inc., on the ground that the Complaint fails to state a claim upon which relief could be granted and further that this Court lacks jurisdiction of the controversy herein.

3. That in addition to deponent's Affidavit, the following Affidavits in support of defendants' Motion herein are annexed hereto:

A. Affidavit of Robert R. Dimock, a Director and the President of Texaco Panama Inc., sworn to in Panama on February 6, 1973.

Affidavit of Alvin L. Stern in Support of Motion to Dismiss

- B. Affidavit of E. F. Pointon, Managing Director of Texaco Overseas Tankship Limited, sworn to in England on February 5, 1973.
- C. Affidavit of Cedric G. Harris, a member of the firm of Hill, Dickinson & Company, solicitors retained on behalf of Texaco Panama Inc., sworn to in England on February 2, 1973.
- D. Affidavit of William J. Clayton, Secretary of Texaco Inc., sworn to in New York on February 16, 1973.

4. That as can be seen from the Affidavit of Mr. Pointon, all of the consolidated actions herein arise out of the collision on January 11, 1971 in the English Channel between the M/V Paracas and S/T Texaco Caribbean and the alleged subsequent allision on January 12, 1971 by the M/V Brandenburg with the hulk of the Panamanian Flag vessel Texaco Caribbean as it lay on the bottom of the English Channel near the Mid-Varne Buoy, within 12 miles of the English Coast.

5. That as a result of the above-mentioned casualties, the following law suits have been commenced:

A. In England:

- (1) An action commenced on May 16, 1972 by the Owners of cargo laden on board the M/V Brandenburg against the Owners of the M/V Paracas, the Owners of the S/T Texaco Caribbean and the Corporation of Trinity House.
- (2) An action commenced on May 18, 1972 by the Owners of the S/T Texaco Caribbean against the Owners of the M/V Paracas.

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- (3) An action commenced on December 7, 1972 by the Owners of the M/V Paracas against the Owners of the S/T Texaco Caribbean.
- (4) An action commenced on January 19, 1973 by the Owners of the M/V Brandenburg against the Corporation of Trinity House.

B. In the United States District for the Southern District of New York:

- (1) Twelve actions commenced on various dates in December, 1972 and January, 1973 by the Public Administrator of the County of New York on behalf of the representatives of deceased German seamen aboard the M/V Brandenburg against Texaco Inc. and Texaco Panama Inc.
- (2) An action commenced on or about January 9, 1973 by the Owners of the M/V Brandenburg against Texaco Panama Inc.
- (3) An action commenced on or about January 10, 1973 by the Owners of cargo laden on board the M/V Brandenburg against Texaco Panama Inc.

C. In the United States District Court, District of Delaware:

- (1) Twelve actions commenced on or about January 9, 1973 by the heirs and representatives of deceased German seamen aboard the M/V Brandenburg against Texaco Inc. and Texaco Panama Inc. These twelve actions are virtually identical to the twelve actions mentioned in paragraph 5B (1) above.

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6. That at all times mentioned in the Complaints herein defendant, Texaco Panama Inc., (hereinafter Texpan) was a Panamanian Corporation having its principal place of business at Via Transismica, Panama, R.P. and was the sole Owner of the Texaco Caribbean.

7. That at all times mentioned in the Complaints herein defendant, Texaco Inc., (hereinafter Texaco) was a Delaware Corporation having a principal place of business at 135 East 42nd Street, New York, New York; and, as will be shown below, this defendant is not a proper party to these actions.

8. That upon information and belief, at all times mentioned in the Complaints herein the M/V Paracas was owned and operated by Naviera Maritima Fluvial, S.A., (hereinafter Naviera) a Peruvian Corporation with offices at J. R. Rufino Torrico 873, Lima, Peru. Naviera does not maintain an office in the United States and is not a party to the litigation here in the United States.

9. That upon information and belief, at all times mentioned in the Complaints herein the Corporation of Trinity House, (hereinafter Trinity House) was and is a British Corporation with offices at Tower Hill, London EC3 England and was and is the Owner of the vessel, Siren. As can more fully be seen from the Affidavit of Mr. Pointon, Trinity House was engaged in locating and marking the wreck of the S/T Texaco Caribbean at the time of the alleged allision by the M/V Brandenburg with said wreck. Trinity House does not maintain an office in the United States and is not a party to the litigation here in the United States.

10. That the plaintiff in twelve of the actions herein alleges that he is the Public Administrator of the County of

Affidavit of Alvin L. Stern in Support of Motion to Dismiss

New York appointed on behalf of the representatives of deceased German seamen employed aboard the M/V Brandenburg, the representatives all being German Nationals. The plaintiff in action 73 Civil 166 is the German Corporate Owner of the German Flag vessel, Brandenburg, and plaintiffs in action 73 Civil 182 are all foreign Nationals or Corporations, etc. having an alleged interest in the cargo laden aboard the M/V Brandenburg at the time of the alleged allision with the S/T Texaco Caribbean. None of the real parties in interest for whom these suits have been brought are United States citizens or residents, or maintain an office in the United States.

AS TO FORUM NON CONVENIENS

11. That it can readily be seen from the above described cast of players and the scene of the subject casualties, these actions have no conceivable connection with the United States. They should have been properly brought in the Courts of England.

12. That unlike those claimants who have commenced actions in England, the plaintiffs herein through their attorneys have imported this litigation into the United States, a foreign jurisdiction some 3,000 or more miles distant from their homes and the scene of the casualties, in complete disregard of every established principle relating to the choice of the most appropriate and convenient forum.

13. Furthermore, as can be seen from the Affidavit of Mr. Harris, certain of the plaintiffs have commenced suit in both forums i.e., England and the United States and have thereby further disregarded every established principle relating to the choice of the most appropriate and convenient forum.

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14. That it is clear, both from the description of events alleged in the Complaints herein and from the statement of facts set forth in Mr. Pointon's Affidavit, that all of the events out of which this litigation arose took place in the English Channel within 12 miles of the English Coast. Furthermore, any of the alleged acts of commission or omission would have had to have taken place in England.

15. That a thorough analysis of the underlying facts in this matter indicates clearly that virtually all of defendants' witnesses (see Affidavits of Messrs. Harris, Pointon and Dimock) and most probably plaintiffs' witnesses are or will be available in England either because they live there, which the majority do, or because they will appear there in connection with the litigation pending in England. It also becomes obvious and apparent that not one witness on behalf of either plaintiffs or defendants is a citizen or resident of the United States.

16. That insofar as documentary evidence is concerned, it is clear from the Affidavits of Messrs. Harris, Pointon and Dimock that all of defendants' documentary evidence is in England. It would also appear to be a logical conclusion that under the facts involved, none of plaintiffs' evidence could come from a United States source.

17. That accordingly, this Court would be without power to compel the attendance of any of the material witnesses in this matter and would be some 3,000 miles distant from the sources of proof.

18. That even were some of the material witnesses willing to testify voluntarily, it seems apparent that the total cost of obtaining their testimony would be far less in Eng-

Affidavit of Alvin L. Stern in Support of Motion to Dismiss

land than in the United States. Furthermore, the witnesses themselves would be greatly inconvenienced in that among other things, they would be forced to travel long distances and would be away from their jobs and families for long periods of time. They would also have to appear and testify in multiple forums.

19. That not only would it be a hardship, burden and inconvenience on the witnesses themselves, but the parties to the litigation would be forced to duplicate efforts, incur enormous expenses and suffer the uncertainty of non-appearance, lacking the means to compel attendance.

20. That in addition to the obvious fact that trial here would be far more costly and burdensome to all the parties involved than would trial in England, it is apparent that if unwilling witnesses cannot be compelled to testify, as shown above, a trial here would result in injustice.

21. That of even more important consideration, however, is the fact that this Court would be powerless to render complete relief in this matter. It is apparent, based on the facts involved herein that Naviera, the M/V Paracas and Trinity House are indispensable parties to this litigation. However, these parties are not present in the United States and are not, and cannot be made, parties to this litigation. On the other hand, as can be seen from the Affidavit of Mr. Harris, all of these indispensable parties are present in England and as mentioned above, are already parties to the lawsuits pending there.

22. That it would be manifestly unfair to require the defendants to defend this foreign cause here where other indispensable parties cannot be joined and where the absence of these indispensable parties would severely prejudice defendants' interest.

Affidavit of Alvin L. Stern in Support of Motion to Dismiss

23. That apart from the aforesaid arguments addressed to the interest of plaintiffs and defendants, there is the additional fact that to permit plaintiffs to maintain these actions (arising from an alleged foreign tort, involving foreign parties and requiring the application of foreign law) would impose an unwarranted and unnecessary burden and expense on this Court. Why should the United States judicial administration be obliged to bear the burden and expense to litigate patently foreign claims?

24. That plaintiffs have a wholly adequate remedy available in England and there is no good reason for these actions being brought in this district, one of the most congested centers of litigation, other than the fact that plaintiffs' attorneys have offices in New York.

25. That, indeed, other than the fact that plaintiffs' attorneys are here, this action has no connection with the United States whatsoever. Although plaintiff (in the twelve death actions only) has gone so far as to name Texaco as a party defendant, a corporation which had no connection with any of the matters involved herein, this, it is submitted, is merely a facade to add some local color and an attempt to show some contact with this jurisdiction. Once Texaco is properly removed from the action, we are left with a law suit by foreigners against a foreign corporation arising out of a collision between foreign flag vessels in the English Channel.

26. That considering all the above, the conclusion is inescapable that to retain jurisdiction in these actions would impose extreme hardship and resultant prejudice on defendants, would impose unnecessary and extreme hardship on all material witnesses, would place an unnecessary

Affidavit of Alvin L. Stern in Support of Motion to Dismiss

burden and expense upon this Court and would not confer any accompanying benefit upon the plaintiffs.

27. That on the other hand, it has been amply demonstrated that (a) the relative ease of access to sources of proof in England, (b) the availability of compulsory process for the attendance of unwilling witnesses at trial in England and its unavailability to this Court, and (c) the tremendous reduction in the cost of trial in England all favor the denial of jurisdiction by this Court so as to relegate plaintiffs to their proper jurisdiction which is England.

AS TO TEXACO

28. Furthermore, as was stated before and as revealed by a careful analysis of the facts involved, Texaco is not a proper party to this litigation. This fact was obvious and apparent to the plaintiffs in the hull damage action (73 Civ. 166) and cargo action (73 Civ. 182) and must have been just as apparent to plaintiffs' counsel in the death actions.

29. That the Affidavits of Mr. Clayton, Mr. Dimock and Mr. Pointon indicate quite clearly that Texaco did not own, operate, manage or control the S/T Texaco Caribbean. In addition, those Affidavits establish that Texaco did not charter the vessel or own any cargo on board the vessel. Furthermore, Texaco did not control the crew of the S/T Texaco Caribbean and was not directing the vessels movements.

30. That the facts here clearly indicate that Texaco was a complete stranger to the events under discussion and did not and does not now bear any relationship whatsoever

Affidavit of Alvin L. Stern in Support of Motion to Dismiss

to the S/T Texaco Caribbean. No liability, therefore, could possibly be established against it.

31. Clearly Texaco is not a proper party to this litigation and was named as a party defendant merely as a facade in an effort to establish some contact, however thin, with this jurisdiction.

AS TO JONES ACT CLAIM

32. That in addition to naming an improper party as a defendant in these actions, plaintiff, in the twelve death actions herein, has alleged in his complaints (paragraph 15) a claim for relief purportedly arising under the Jones Act. However, nowhere in those complaints is there any allegation to the effect that either of the defendants was the employer of any of the deceased German seamen—an essential factor for any action based upon a Jones Act Claim.

33. That it is clear from the facts involved in this matter that neither Texpan nor Texaco was the employer of any of the deceased German seamen and thus, no such allegation could be made. In fact, the defendants herein have never had a relationship of any nature whatsoever to the M/V Brandenburg or its crew.

34. That therefore, there is no basis at all for the application of the Jones Act in this matter and it is obvious that plaintiffs' counsel has employed the "shot gun" method in preparing his complaint not only by naming improper parties but by also alleging claims for relief which on their face are totally lacking in merit.

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AS TO JURISDICTION

35. That as further evidence of the above, it should be pointed out that the plaintiff in the twelve death actions herein has alleged in his complaints various claims for relief based on negligence, unseaworthiness, loss of consortium and the Wrongful Death Act of the State of New York.

36. That under close scrutiny, the above mentioned claims must fail. Any recovery to which plaintiff might be entitled on the above mentioned claims can only be based on the non-statutory General Maritime Law of the United States or on the law of the State of New York and can only be granted in a proceeding under 28 U.S.C.A. 1332, which requires diversity of citizenship.

37. That as can readily be seen from the Affidavits submitted in support of this Motion, complete diversity does not exist as between plaintiffs and all of the defendants and that therefore, those claims are defective and have been alleged only for the purpose of attempting to show some contact with this jurisdiction and its laws.

AS TO THE DEATH ON THE HIGH SEAS ACT CLAIM

38. That plaintiff, in the twelve death actions herein, has also alleged in paragraph 16 of his complaints, a claim for relief based on the Death on the High Seas Act. However, this claim, as was the Jones Act Claim, is completely spurious and lacking in merit.

39. That it is clear from all of the foregoing that this litigation involves claims based on an alleged foreign tort (English Channel) between foreign flag vessels (Peruvian, German and Panamanian), owned by foreign corporations; that none of the claimants are United States citizens or

Affidavit of Alvin L. Stern in Support of Motion to Dismiss

residents; that all of the claimants have a convenient and more readily accessible forum in England; and that based on established choice of law principles foreign law and not United States Law governs the rights of the parties hereto.

40. That viewing all of the contacts of this maritime tort, both with the United States (of which there are none other than the presence of plaintiffs' attorneys) and foreign states, and giving each its appropriate weight and significance, it is clear that such contracts as there are with the United States are less than minimal and completely insufficient for the application of the Death on the High Seas Act.

41. In summary, it is submitted that the record in this litigation clearly indicates that Texaco is not a proper party to these actions, all claims for relief based on the Jones Act, the non-statutory general maritime law of the United States, the laws of the State of New York and the Death on the High Seas Act are totally lacking in merit and should be dismissed and that any claim alleged against Texpan should be properly litigated in the Courts of England.

42. Insofar as any question concerning jurisdiction over Texpan in England is concerned, it is clear from the Affidavits of Mr. Dimock, Mr. Pointon and Mr. Harris that Texpan is amenable to service of process in England and is subject to the jurisdiction of the English Courts. Accordingly, there is no question that any judgment which might be recovered by any of the claimants arising out of the subject casualties can be satisfied by Texpan in England. Moreover Texpan's vessels, whether owned and/or chartered call there regularly.

WHEREFORE, it is respectfully requested that:

*Affidavit of Robert R. Dimock in Support of Motion to
Dismiss*

- (1) This action be dismissed as to Texpan on the ground on *forum non conveniens* subject to whatever conditions this Court considers proper under the circumstances here present;
- (2) Summary Judgment be granted dismissing this action as to Texaco Inc. for failure to state a claim upon which relief could be granted; and
- (3) Such other and further relief as the justice of the case may require.

/s/ ALVIN L. STERN

Sworn to by Alvin L. Stern on February 28, 1973.)

**Affidavit of Robert R. Dimock in Support of Motion to
Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

REPUBLIC OF PANAMA	}	ss.:
PROVINCE OF PANAMA		
CITY OF PANAMA		
EMBASSY OF THE UNITED		
STATES OF AMERICA		

ROBERT R. DIMOCK, being duly sworn, deposes and says:

1. I am a Director and the President of Texaco Panama Inc., (hereinafter TEXPAN), a Panamanian Corpora-

*Affidavit of Robert R. Dimock in Support of Motion to
Dismiss*

tion with its principal place of business at Via Transis-
mica, Panama, R.P. and a mailing address at Apartado
3104, Panama 3, Panama.

2. At all times mentioned in the Complaints herein
Texpan was the sole Owner of the Texaco Caribbean, a
tank vessel registered under the laws of the Republic of
Panama.

3. On January 11, 1971 the Texaco Caribbean became
a total loss as the result of a collision with the Peruvian
vessel, M/V Paracas in the English Channel, Dover Straits.

4. On the following day, namely, January 12, 1971,
German vessel, Brandenburg, apparently allided with the
wreck of the Texaco Caribbean as it lay submerged in the
Dover Straits near the Mid-Varne buoy.

5. At all times mentioned in the Complaints herein,
the Texaco Caribbean, as well as other vessels owned by
or otherwise under Texpan's control, was managed and
operated by Texaco Overseas Tankship Limited, (herein-
after TOT), a corporation organized and existing under
the laws of Great Britain, with offices at London, England.

6. The Master, officers and crew, who were aboard the
Texaco Caribbean at the time of the initial casualty, were
Italian Nationals and were not citizens or residents of the
United States.

7. In view of the fact that the subject casualties oc-
curred in the English Channel, TOT is thoroughly familiar
with the facts and circumstances surrounding the casualties
including the steps taken by the British Corporation of
Trinity House to locate and mark the wreck of the Texaco
Caribbean and to warn other vessels of the presence of the
wreck. Furthermore, all material records, documents and

*Affidavit of Robert R. Dimock in Support of Motion to
Dismiss*

witnesses concerning the subject casualties are located in England.

8. As a result of the subject casualties, various claims and four law suits have been commenced in England involving the major parties to the casualties.

9. There are no witnesses on behalf of Texpan who are citizens or residents of the United States. All of Texpan's witnesses, i.e. employees of TOT, surviving crewmembers of the Texaco Caribbean, employees of Trinity House, crewmembers of the British fishing vessels, Accord and Viking Warrior, amongst others, reside in England and are subject to compulsory process issuing out of an English Court or will be produced in England in connection with the suits and claims presently pending there. In addition, the other parties to the suits presently pending in England would be required to produce their witnesses there in connection with the litigation.

10. It would impose extreme hardship and prejudice on Texpan if it were called upon to defend these actions in the United States as well as the suits presently pending in England. Most of the witnesses necessary for Texpan's defense are not in Texpan's employment and would not be subject to compulsory process issuing out of the United States District Court to compel their attendance as witnesses in proceedings brought in the United States. Even if they agree to voluntarily appear for any such court proceedings, all witnesses and records would have to be transported back and forth across the Atlantic Ocean in order to be available in both jurisdictions. This would impose unnecessary hardships, inconvenience and expense on not only Texpan but on the witnesses themselves and their

*Affidavit of Robert R. Dimock in Support of Motion to
Dismiss*

employers. On the other hand, if they did not agree to voluntarily testify, there would be no means by which Texpan could bring before this tribunal all the essential facts and circumstances surrounding the matters here in litigation.

In addition to the exorbitant expense and inconvenience that would be involved, Texpan would also be severely prejudiced if these actions were retained by a United States Court, since other parties essential to the litigation who are or may be liable to Texpan and the Brandenburg could not be made party to the suits pending in the United States. These other essential parties, however, are present in England and are parties to the litigation pending there.

11. Texpan is amenable to service of process in England and is subject to the jurisdiction of the English Courts.

12. In connection with any of the present suits pending in the United States, Texpan warrants that it will not raise the defense of any applicable Statute of Limitations in any similar suit commenced in England assuming the suit had been previously commenced within the time period so provided and is commenced in England within a reasonable time following dismissal or on such terms as the United States Court might direct.

/s/ ROBERT R. DIMOCK

(Sworn to by Robert R. Dimock on February 6, 1973.)

**Affidavit of E. F. Pointon in Support of Motion to
Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

KINGDOM OF ENGLAND }
CITY OF LONDON } ss.:

E. F. POINTON, being duly sworn, deposes and says:

1. I am, and at all times mentioned in the Complaints herein was, the Managing Director of Texaco Overseas Tankship Limited, (hereinafter TOT), a corporation organized and existing under the laws of Great Britain with its principal place of business located at 1 Knightsbridge Green, London, SW 1, England.

2. TOT is and at all times herein relevant was engaged in the business of ship management and operation.

3. In connection with its business as ships' managers, TOT, at all times mentioned in the Complaints herein, managed and operated the Texaco Caribbean on behalf of its owner, Texaco Panama Inc., (hereinafter Texpan), in addition to other vessels in Texpan's fleet.

4. In particular, TOT, in performing its function as a ship manager, does the following, amongst others:

- (a) Equips, victuals, mans, supplies and maintains the vessels in the Texpan fleet and in particular, did so for the Texpan Caribbean prior to the occurrence of the subject casualties;

Affidavit of E. F. Pointon in Support of Motion to Dismiss

- (b) Appoints agents and sub-agents at out ports;
- (c) Prosecutes, defends, disposes of, settles, etc. all disputes, suits, insured or uninsured claims, general average adjustments, etc. involving Texpan and its vessels in the United Kingdom and elsewhere.

5. On the evening of January 10, 1971 the Texaco Caribbean, owned by Texpan, sailed from Terneuzen, Netherlands in ballast for Trinidad. The River Scheldt pilot who had been aboard the vessel departed at 0024 hours on January 11, 1971 and thereafter the vessel proceeded to navigate through the English Channel.

The voyage proceeded uneventfully until approximately 0405-0410 hours when the Peruvian vessel, Paracas, bound from Peru to Hamburg, collided with the Texaco Caribbean. The collision occurred in the English Channel, Straits of Dover in a position approximately 1.0 to 1.5 miles west of the Mid-Varne buoy which was established and maintained by Trinity House and was within 12 miles of the English Coast. Following the collision, the Texaco Caribbean broke in two. The forward section sank almost immediately while the stern section did not sink until approximately 1408 hours that afternoon.

Almost immediately, our office was advised of the casualty and personnel of our office departed for Dover and the scene of the casualty. In addition, the appropriate agencies, i.e., Corporation of Trinity House, the Admiralty, etc. were advised of the casualty.

At approximately 0752 hours the British Corporation of Trinity House which has the duty of locating and marking wrecks off the Coast of England, dispatched its

Affidavit of E. F. Pointon in Support of Motion to Dismiss

vessel Siren to the scene of the casualty. The Siren arrived in the vicinity of the casualty at approximately 1630 hours and moored in the immediate vicinity as a warning to other shipping to keep clear. During this time, she displayed a warning signal of three green lights in a vertical line, one over the other. In the meanwhile, numerous navigation warnings were being broadcast by the English radio stations located at North Foreland and Niton.

Shortly after 0730 hours on the following day, January 12, 1971, the German vessel, Brandenburg on a voyage outbound from Antwerp, Belgium approached the area. The officer in charge of the navigation of the Brandenburg sighted the Trinity House vessel, Siren, and observed the three green vertical light signal being displayed. Apparently this signal was not properly interpreted by the Brandenburg and it thereafter allegedly allided with the wreck of the stern section of the Texaco Caribbean. The Brandenburg sank immediately.

Prior to the sinking of the Brandenburg, crewmembers aboard the British fishing vessels, Accord and Viking Warrior, observed the approach of the Brandenburg in the vicinity of the Siren and after the sinking picked up survivors and the bodies of deceased seamen from the Brandenburg and brought them to Folkstone, England where autopsies and an inquest were held.

6. Immediately after the Paracas/Texaco Caribbean collision and subsequent Brandenburg allision various employees of TOT in England followed the operations being performed by the corporation of Trinity House that were concerned with locating and marking the wrecks. In ad-

Affidavit of E. F. Pointon in Support of Motion to Dismiss

dition, records of Texpan concerning the Texaco Caribbean and in particular, the subject casualties are kept in England where our main office is and where law suits and claims arising out of the subject casualties are presently being prosecuted and defended.

7. In connection with the above-mentioned claims and law suits, and in order to prosecute and protect Texpan's interest, we, on behalf of Texpan, engaged the firm of Hill, Dickinson & Company, London Solicitors.

8. All of the witnesses necessary for a proper defense by Texpan, i.e., surviving crewmembers of Texaco Caribbean, employees of TOT, employees of Trinity House, crewmembers of the British fishing vessels, Accord and Viking Warrior, amongst others, reside in England or would be available in England in connection with the litigation and claims presently pending in England. None of these witnesses are citizens or residents of the United States. Furthermore, none of the various plaintiff's witnesses are citizens or residents of the United States.

9. If the suits presently pending in the United States are retained in that jurisdiction, it would impose extreme hardships on Texpan to force it to defend actions in both the English and American Courts. In particular, the costs and expense involved in transporting witnesses and records back and forth across the Atlantic Ocean would be exorbitant. In this connection all of the witnesses would have to agree to testify voluntarily since the vast majority are not employees of Texpan nor would they be subject to compulsoy process of a United States Court.

10. Even if these witnesses voluntarily agreed to testify, they would be greatly inconvenienced in that, among

Affidavit of E. F. Pointon in Support of Motion to Dismiss

other things, they would be forced to travel long distances and would be away from their jobs and families for long periods of time.

11. Furthermore, Texpan would be greatly prejudiced in its defense of any United States Court proceeding because of the unavailability in the United States of other parties essential to the litigation. These other essential parties, i.e., the Paracas and her owners and Trinity House are presently available in England and are already subject to the jurisdiction of the English Courts. The Brandenburg's owners and the owners of cargo aboard the Brandenburg have already commenced litigation in England and are subject to the jurisdiction of the English Courts.

In addition, unless all the claims arising out of the subject casualties are presented in one Court, where all the essential parties can be assembled, there is the possibility that inconsistent judgments might be rendered because of the unavailability of parties, witnesses and proof of facts.

12. Texpan is amendable to service of process in England and is subject to the jurisdiction of the English Courts.

/s/ E. F. POINTON

(Subscribed and sworn to by the above-named E. F. Pointon at 1, Knightbridge Green, London, England this 5th day of February, 1973.)

**Affidavit of Cedric G. Harris in Support of Motion to
Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

KINGDOM OF ENGLAND }
CITY OF LONDON } ss.:

CEDRIC G. HARRIS, being duly sworn, deposes and says:

1. I am a member of the firm of Hill, Dickinson & Company, Solicitors, retained on behalf of Texaco Panama Inc., (hereinafter Texpan) in connection with certain claims and law suits arising out of (a) the collision on January 11, 1971 between the Paracas and Texaco Caribbean in the English Channel, Dover Straits, and (b) the subsequent allision on January 12, 1971 between the German vessel, Brandenburg, and the wreck of the Texaco Caribbean as it lay submerged in the Dover Straits, approximately 1.5 miles west of the Mid-Varne buoy and within 12 miles of the English Coast.

2. In connection with our retention in this matter, we have, amongst other things, performed an investigation of the subject casualties, attended at inquests in England respecting the bodies brought ashore at Folkestone, and elsewhere in England, attended at a hearing held in Germany concerning the collision, have been in constant communication with local counsel in England representing all of the major parties to the subject casualties and are prosecuting and defending Texpan's interest in connection with the law suits pending in England.

**Affidavit of Cedric G. Harris in Support of Motion to
Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

KINGDOM OF ENGLAND }
CITY OF LONDON } ss.:

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2. In connection with our retention in this matter, we have, amongst other things, performed an investigation of the subject casualties, attended at inquests in England respecting the bodies brought ashore at Folkestone, and elsewhere in England, attended at a hearing held in Germany concerning the collision, have been in constant communication with local counsel in England representing all of the major parties to the subject casualties and are prosecuting and defending Texpan's interest in connection with the law suits pending in England.

*Affidavit of Cedric G. Harris in Support of Motion to
Dismiss*

5. In addition to Texpan, the following essential parties are represented by counsel in London, England:

- (a) The Owner of the Paracas—Messrs. Ince & Co.
- (b) The Owners of the Paracas' cargo—Messrs. Clyde & Co.
- (c) The Owners of the Brandenburg—Messrs. Bentleys, Stokes & Lowless.
- (d) The Owners of the Brandenburg's cargo—Messrs. Waltons & Co.
- (e) The Corporation of Trinity House—Messrs. Freshfields.

All of the above-mentioned firms are well-known to us and all are experienced in Maritime Law

6. In connection with both the prosecution and defense of the claims and actions now pending in England, the testimony of the following witnesses, amongst others, would be required on behalf of Texpan and undoubtedly the other parties:

- (a) Those surviving crewmembers of the Texaco Caribbean having knowledge of the facts and circumstances surrounding the Paracas Texaco Caribbean collision who are Italian nationals and will be available in England;
- (b) Employees of Texaco Overseas Tankship Limited, the operator and manager on behalf of Texpan of the Texaco Caribbean, all of whom reside in England;
- (c) Employees of the Corporation of Trinity House who were engaged in locating and marking the

*Affidavit of Cedric G. Harris in Support of Motion to
Dismiss*

wreck of the Texaco Caribbean and who were on the scene at the time of the Brandenburg allision, all of whom reside in England;

(d) The crewmembers of the British fishing vessels, Accord and Viking Warrior, which vessels were on the scene prior to and following the Brandenburg allision, all of whom reside in England.

(e) Surviving crewmembers of the Brandenburg who reside in Germany but who would be available in England in connection with the suits pending there.

(f) Employees of the Ministry of Defense (Navy) and employees at the North Foreland and Niton Radio Stations all of whom reside in England and who would testify concerning the numerous communications sent and received prior to and at the time of the subject casualties.

(g) Witnesses of the Paracas and Brandenburg who would be made available in England in connection with the litigation pending there.

7. In addition to the above-enumerated witnesses, it will be necessary to obtain or produce various documents, records and radio station log books, all of which are located in England.

8. In resolving the claims and disputes arising out of the subject casualties both the British Court and the United States District Court would have to determine identical issues. In order to properly defend these actions and present evidence Texpan would have to produce, at any trial in the United States, the same above-enumerated witnesses

*Affidavit of Cedric G. Harris in Support of Motion to
Dismiss*

and the same records and documents that would be produced in England. This duplication of effort would not only be unnecessary, expensive and wasteful, but would be a burden upon the Courts involved, not to mention the danger of their rendering inconsistent judgments.

9. All concerned parties to the subject casualties are present in England and represented by counsel in England. The majority are not present in the United States and could not be impleaded in the suits commenced in the United States. It would be necessary to the just resolution of any claims arising out of the subject casualties that all essential parties participate, otherwise, complete relief could not be afforded.

10. It is clear from the above that Texpan would be greatly prejudiced and inconvenienced if it were forced to defend suits in the United States in addition to those already pending in England. Firstly, not all of the other essential parties would be participants in any United States litigation. Secondly, many, if not all, of the necessary witnesses would be unavailable to testify before the United States District Court. Even were the witnesses to voluntarily agree to testify, the cost involved in transporting so many witnesses and documentation back and forth across the Atlantic Ocean would be exorbitant.

11. If these suits are retained in the United States, there would be great danger, as previously mentioned, of inconsistent judgments and resultant prejudice because of the unavailability in the United States of necessary witnesses and documents and of all the essential parties. These witnesses, documents and other parties would be required to fully apprise the United States District Court of all the facts and circumstances surrounding the casual-

*Affidavit of Cedric G. Harris in Support of Motion to
Dismiss*

ties and to enable it to place ultimate liability on the proper party or parties.

12. It would be an easy matter for the plaintiffs in the suits recently filed in the United States to file their claims in the English Courts where all parties have counsel, are presently available and where complete relief could be afforded. It would not impose any hardships on said plaintiffs to do so, and in fact, it would in all probability be much more convenient for them to litigate and establish their claims in England which is geographically much closer than is the United States.

13. Texpan is amenable to service of process in England and the jurisdiction of the English Courts. In addition, my firm has been specifically authorized by Texpan to accept service of process on its behalf in connection with any of the present suits pending in the United States District Court provided that a similar action is commenced within a reasonable time following dismissal of such suit in the United States.

/s/ CEDRIC G. HARRIS

(Subscribed and sworn to by the above-named CEDRIC G. HARRIS at 5, Fenchurch Street in the City of London, England this 2nd day of February, 1973.)

Exhibit A—(Annexed to Affidavit of Cedric G. Harris)

Writ and Statement of Claim
(Brandenburg)

(Mounted Opposite)

THE PLAINTIFFS' CLAIM

Against the First Defendants the Owners of the Ship or Vessel
PARACAS and/or the Second Defendants ^{the Owners of} the Ships or vessels TEXACO
ALASKA, TEXACO BRISTOL, TEXACO COLUMBIA, TEXACO IDAHO, TEXACO IOWA,
TEXACO KENTUCKY, TEXACO KEENA, TEXACO LONDON, TEXACO MARACAIBO,
TEXACO NEW MEXICO, TEXACO OHIO, TEXACO PENNSYLVANIA, TEXACO PUERTO
RICO, TEXACO TEXAS, TEXACO UTAH, TEXACO VENEZUELA, TEXACO VIRGINIA
who were at all material times the Owners of the Ship or Vessel
TEXACO CARRIBEAN damages for the damage loss and expense sustained
by the Plaintiffs by reason of the nuisance and/or negligence on
the part of the First and/or Second Defendants, their servants or
agents in causing or permitting the Second Defendants Ship or
Vessel TEXACO CARRIBEAN to sink in the DOVER Straits on or about
the 11th January 1971;

- (2) Against the First and/or Second Defendants damages for the damage
loss and expense sustained by the Plaintiffs by reason of the
nuisance and/or negligence and/or breach of statutory duty in and
about the protection of other vessels such as BRANDENBURG from
coming into collision with the TEXACO CARRIBEAN or her wreck after
the said sinking, it being a danger and/or obstruction to navigation
- (3) Against the Third Defendants damages for the damage loss and expense
sustained by the Plaintiffs by reason of the nuisance and/or
negligence and/or breach of statutory duty in and about the
protection of other vessels as aforesaid

The Plaintiffs or some of them reside outside the Scheduled
Territories as defined by the Exchange Control Act 1947 at the
addresses as shown below.

This Writ was issued by Waltons & Co. of Plantation House,
31-35, Fenchurch Street, London, EC3M 3NN

Solicitors for the said Plaintiffs who reside at the port of
Antwerp in the Kingdom of Belgium, Rotterdam in the Kingdom of
the Netherlands, Bremen in the Federal Republic of Germany,
Santo Domingo in the Republic of Dominica, Kingston Jamaica and
Curacao in the Netherland Antilles and other ports.

This Writ was served by me at *Queen Elizabeth Dock*
on the *Pomona*

on *Wednesday* the *17th* day of *May* 1972.

by affixing this original list for a short time on a
conspicuous part of the ship's superstructure and
removing it fixing a copy in a plastic envelope
in its place.

(Signed)G. R. Aye.....

(Address) Custom House, Hull, E.

(Rank) Senior Housekeeper Messing

(Full Name) George Richard Aye.

(Date) 17th May. 1972.

ONLY COPY AVAILABLE

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

ADMIRALTY action in

The Ship PARACAS

The Ships TEXACO ALASKA
& in personam against

The CORPORATION of TRINITY

BETWEEN

THE OWNERS of cargo lately
laden on board the ship or
BRANDENBURG Plaintiff

THE OWNERS of the ship or vessels
PARACAS 1st Defendant

THE OWNERS of the ships or
vessels TEXACO ALASKA and others
2nd Defendants

THE CORPORATION OF TRINITY INC.

3rd London

WRIT IN ADMIRALTY

ACTION IN REM

Dated	16 May	1972
Served		19
Appearance entered		19

Waltons & Co.,
Plantation House,
31-35, Fenchurch St.
London EC3M 3NN

Plaintiffs'
Solicitor.

ONLY COPY AVAILABLE

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMIRALTY COURT

ADMIRALTY action in rem against:

THE SHIP "PARACAS" and the SHIPS "TEXACO ALASKA" and
16 OTHERS

and in personam against:

THE CORPORATION OF TRINITY HOUSE

Writ of Summons issued on the 16th May, 1972.

B E T W E E N :

THE OWNERS OF CARGO LATELY LADEN
ON BOARD THE SHIP OR VESSEL
"BRANDENBURG"

Plaintiff:

THE OWNERS OF THE SHIP OR VESSEL
"PARACAS"

First Defendant:

- and -

THE OWNERS OF THE SHIPS OR VESSELS
"TEXACO ALASKA" and 16 OTHERS

Second Defendant:

- and -

THE CORPORATION OF TRINITY HOUSE

Third Defendant:

STATEMENT OF CLAIM

1. The Plaintiffs, as the owners of the cargo laden on board the ship "BRANDENBURG", claim damages in respect of damage, loss and expense suffered by them as a consequence of the sinking of "BRANDENBURG" in the circumstances hereinafter set out.

2. "BRANDENBURG" is a motor vessel registered in the port of Hamburg of 2,695 tons gross and 1,464 tons net register, some 362 feet 2 inches in length and 43 feet 10 inches in beam and powered by diesel engines capable of developing 3600 h.p.
3. Shortly before about 07.00 hours on the 12th January 1971, "BRANDENBURG" was in the Dover Strait in the course of a voyage from Antwerp to the West Indies laden with a general cargo of 3,892 tons, including that owned by the Plaintiffs. Her draught on departure from Antwerp was about 21 feet forward and 21 feet 2 inches aft. The wind was Southerly, force 3 to 4, the weather was fine and clear, and the tide was flooding in a South-Westerly direction at the rate of about $1\frac{1}{2}$ knots. "BRANDENBURG" was on a course of 236° true and, with her engines working at full ahead, was making about 14 knots through the water.
4. In these circumstances, three green lights in a vertical line were observed distant about 5 to 6 miles and bearing about $\frac{1}{2}$ to 1 point on the starboard bow of "BRANDENBURG". The vessel exhibiting these green lights which later proved to be the Third Defendants vessel "SIREN" was observed to be stationary. "BRANDENBURG" maintained her course and speed. She passed "SIREN" at a distance of about 6 to 7 cables to starboard. Shortly thereafter, "BRANDENBURG" struck a submerged object which later proved to be

the wrecked stern section of the Second Defendants' vessel "TEXACO CARIBBEAN".

Thereafter "BRANDENBURG" sank approximately in position latitude 50° 58' 30" North, longitude 01° 17' 44" East, whereby the Plaintiffs' cargo was totally lost.

5. At about 04.00 hours on the 11th January 1971, a collision had occurred in the Dover Strait in the vicinity of the Varne between the First Defendants' vessel "PARACAS" and the Second Defendants' vessel "TEXACO CARIBBEAN". As a result of the collision "TEXACO CARIBBEAN" exploded and broke in two. The two sections of the vessel thereafter sank.

6. The said collision between "PARACAS" and "TEXACO CARIBBEAN" was caused by the negligence of the First and/or Second Defendants, their servants or agents in the following particular respects.

PARTICULARS

- (a) They failed to keep a good look-out;
- (b) They failed to ease, stop or reverse their engines in due time or at all;
- (c) They failed to steer a safe course;
- (d) They failed to heed or follow the recommended routes for vessels passing through the Dover Straits;
- (e) They failed to comply with the Collision Regulations, 1965.

The Plaintiffs cannot give further or better particulars of the negligence alleged until after discovery.

7. Further or alternatively the First and/or Second Defendants contemplated or ought reasonably to have contemplated that, if as a result of failure by themselves their servants or agents to take reasonable care in the navigation or management of "PARACAS" and/or "TEXACO CARIBBEAN", the said ships were to collide in the Dover Strait, then "TEXACO CARIBBEAN" might explode and/or sink with the following foreseeable consequences and each of them:-

- (a) unless warned of their presence and position, ships, particularly those proceeding in a South-Westerly direction through the Dover Strait along the Recommended Traffic Lane as was "BRANDENBURG", would thereafter pass over or close to the wrecked portions of "TEXACO CARIBBEAN";
- (b) vessels, such as "BRANDENBURG", whose intended route during the 12th January took them over or near the wrecked portions of "TEXACO CARIBBEAN" could, or would, not be warned of their presence or position in time to avoid them;
- (c) the positions of the wrecked portions of "TEXACO CARIBBEAN" could or would not be discovered before vessels such as "BRANDENBURG" passed over or near them;
- (d) the wrecked portions of "TEXACO CARIBBEAN" could or would not be marked adequately, sufficiently or at all before vessels such as

- "BRANDENBURG" passed over or near them;
- (e) vessels such as "BRANDENBURG" whose intended route during the 12th January took them over or near the wrecked portions of "TEXACO CARIBBEAN" could, or would, not be warned or be aware of or understand any temporary arrangements made to mark them;
 - (f) insufficient time would be available for adequate measures to be taken to prevent vessels such as "BRANDENBURG" coming into contact with the wreck;
 - (g) the wreck would present an obstruction or danger to navigation until removed.

8. In the premises the loss of the cargo on board "BRANDENBURG" and the resulting damage loss and expense incurred by the Plaintiffs were proximately caused by and/or were the direct and/or reasonably foreseeable consequence of the negligence of the First and/or Second Defendants in causing or permitting "PARACAS" and "TEXACO CARIBBEAN" to collide and/or thereby causing or permitting "TEXACO CARIBBEAN" to sink.

9. Further or alternatively, the First and/or Second Defendants by their servants or agents committed and/or created a public nuisance in that they negligently caused or permitted "PARACAS" and "TEXACO CARIBBEAN" to collide and thereby caused or permitted "TEXACO CARIBBEAN" to sink. The wrecked

portions of "TEXACO CARIBBEAN" thereafter constituted a danger and/or obstruction to navigation by reason of which the Plaintiffs have suffered special damage loss and expense.

10. At all material times the Second Defendants were the owners of the wreck of "TEXACO CARIBBEAN". Further at all material times the wreck of "TEXACO CARIBBEAN" was in the possession and control of the Second Defendants.
11. In the premises following the collision with the "PARACAS" it was the duty of the Second Defendants to protect other vessels from coming into contact with the sunken wreck of "TEXACO CARIBBEAN" and thereby sustaining damage.
12. The Second Defendants, by their servants or agents including the Third Defendants, have negligently failed to discharge their said duty.

PARTICULARS

- (a) they failed to give a radio warning to "BRANDENBURG" of the presence and positions of the wreck;
- (b) they failed to give a radio warning to "BRANDENBURG" of the position of "SIREN" and the side to which "BRANDENBURG" should pass her;
- (c) they failed to ensure or request that such warnings should be

broadcast by Belgian and/or Dutch transmitters;

- (d) they failed to discover the positions of the wrecked portions of "TEXACO CARIBBEAN" before dusk on the 11th January;
- (e) they failed to request or accept professional salvage assistance to search for the wreck and to mark it;
- (f) they failed to position "SIREN" over or in the immediate vicinity of the wrecked portions;
- (g) they improperly sought to use the lateral system of buoyage; they failed to use the cardinal system;
- (h) they failed to treat the wreck as if it lay on the open sea;
- (i) they made use of the lateral system in an improper and/or misleading fashion;
- (j) by placing "SIREN" in the Recommended Traffic Lane for vessels bound to the South and West and in a position in which the flood tide flows South-Westerly, they indicated to vessels such as "BRANDENBURG" that "SIREN" should be left to starboard;
- (k) they failed to indicate to vessels such as "BRANDENBURG" that it was unsafe to leave "SIREN" to starboard even at a distance of over half a mile;

- (l) they failed to instruct those on board "SIREN" or the "VARNE" light vessel to keep a look-out for vessels such as "BRANDENBURG" shaping to pass to the East of "SIREN";
- (m) those on board "SIREN" and the light vessel "VARNE" failed to warn "BRANDENBURG" by means of lights or sound signals that she was standing-into-danger;
- (n) those on board "SIREN" and the light vessel "VARNE" failed to keep any or any proper look-out;
- (o) they failed to place more buoys and/or lights in the area where wreckage and oil had been observed.

- 13. In the premises, the Plaintiffs have suffered damage by reason of the negligence and/or nuisance of the Second Defendants.
- 14. The Third Defendants are the general lighthouse authority for England and Wales, and the adjacent seas and islands, within the meaning of Section 634 of the Merchant Shipping Act, 1894. They are also the owners of "SIREN" and the light vessel "VARNE".
- 15. In the exercise of their powers (if any) and/or their duty (if any) under Sections 530 and 531 of the said Act and/or at the request or with the consent of the Second Defendants, the Third Defendants their servants or agents, sought to discover and mark the wreck of "TELAGO CARIBBEAN"

in order to protect vessels such as
"BRANDENBURG" from coming into contact
with the same, it being a danger and/or
obstruction to navigation.

16. In so acting, the Third Defendants their
servants or agents were negligent and/or
in breach of duty in the respects alleged
in paragraph 12 hereof. Further the
Third Defendants adopted the nuisance
constituted by the said wreck.
17. In the premises, the Plaintiffs have
suffered damage by reason of the
negligence and/or nuisance and/or breach
of statutory duty of the Third Defendants.

AND THE PLAINTIFFS CLAIM:-

- (1) Judgment against the Defendants
and each of them for the damage
sustained, together with interest
and costs.
- (2) A reference to the Registrar to
assess damages.

DAVID STEEL.

SERVED this 24th day of January 1973
by Waltons & Co., of Plantation House, 31/35 Fenchurch
Street London EC3N 3BH, Solicitors for the Plaintiffs.

This is the Exhibit marked "A" mentioned and referred to in the annexed Affidavit of CEDRIC G. HARRIS sworn this 2nd day of February 1973.

Before me :

J. Malcolm Waugh
W. G. H.
Notary Public
London, England
(J. Malcolm Waugh)

IN THE HIGH COURT OF
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

ADMIRALTY action in rem :

THE SHIP "PARACAS" and the
"TEXACO ALASKA" and 16 OTHERS

and in personam against:

THE CORPORATION OF TRINITY HOUSE

Writ of Summons issued on the
May, 1972

B E T W E E N :

THE OWNERS OF CARGO LATELY LAD
ON BOARD THE SHIP OR VESSEL
"BRANDENBURG"

Plaintiff

THE OWNERS OF THE SHIP OR
VESSEL "PARACAS"

First Defendant

- and -

THE OWNERS OF THE SHIPS OR VESSELS
"TEXACO ALASKA" and 16 OTHERS

Second Defendant

- and -

THE CORPORATION OF TRINITY HOUSE

Third Defendant

STATEMENT OF CLAIM

MESSRS. WALTONS & CO.,
Plantation House,
31/35 Fenchurch Street,
London E.C3 3HN.

Solicitors for the Plaintiffs.

Admiralty 1
Writ of Summons
in Admiralty Action
in Rem
(O. 73, r.
21)
Law Society
191-192

88a

Exhibit B—(Annexed to Affidavit of Cedric G. Harris)

Writ

(Texaco Caribbean)

(Mounted Opposite)

DIVISION

1972, Folio 207

In the High Court of Justice

ADMIRALTY DIVISION

ADMIRALTY COURT
action in rem against:

Admiralty 1

Writ of Summons
in Admiralty Action
in Rem
(O. 75, r. 3)

The Solicitors
Law Stationery Society
Limited
191-193 Fleet Street
E.C.4
3 Bucklebury, E.C.4
49 Red Lion Row, W.C.1
6 Victoria Street, S.W.1
15 Hanover Street, W.1
55-59 Newhall Street
Birmingham, 3
31 Clifton Street
Cardiff
19 & 21 North John St.
Liverpool, 2
28-30 John Dalton St.
Manchester, 2

F14217.12-5-66

The Ship ⁽¹⁾

"PARACAS"

⁽²⁾

THE OWNERS OF THE STEAM TANKER

"TEXACO CARIBBEAN"

PLAINTIFFS

AND

The Owners of ⁽³⁾

THE MOTOR VESSEL

"PARACAS"

DEFENDANTS

- (1) Or as may be describing the res.
- (2) The Owners of the Ship "Y" or as may be.
- (3) The Ship "X" or as may be describing the res.

Elizabeth the Second, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith: To the [Owners of ~~and the Motor Vessel~~ the Ship

"PARACAS"

of the Port of Callao

Carriage, etc., ⁽⁴⁾

Acceptance of service hereof on behalf of the Defendants. 25/5/72

14

WE COMMAND YOU that within 14 days after the service of this Writ, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of The Owners of the Steam Tanker

"TEXACO CARIBBEAN"

and take notice that in default of your so doing the Plaintiffs may proceed therein, and judgment may be given in your absence, and if the res described in this Writ is then under arrest of the Court it may be sold by order of the Court.

Witness, Quintin McGarel Baron Hailsham of St. Marylebone
Lord High Chancellor of Great Britain, the day
of May 1972.

NOTE.—This Writ may not be served more than 12 calendar months after the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The Defendants may enter an appearance in this writ by a Solicitor either (1) by handing in the appropriate forms duly completed, at the Admiralty Registry, Royal Courts of Justice, Strand, London, W.C.2, or (2) by sending them to that office by post. The appropriate forms may be obtained by sending a postal order for £1.00 with an addressed envelope, 6 1/2 inch size, to the Admiralty Registry, Royal Courts of Justice, Strand, London, W.C.2.

Chief Clerk
(over)

ONLY COPY AVAILABLE

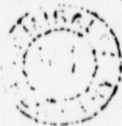
White P

THE PLAINTIFFS' CLAIM is for loss and damage arising out of or occasioned by a collision between the Plaintiffs' ship "TEXACO CARIBBEAN" and the Defendants' ship "PARACAS" on or about the 11th day of January 1971 in the Dover Strait by reason of the negligence of the Defendants, their servants or agents whereby the Plaintiffs have suffered loss and damage.

The Plaintiffs' address is as shown below and as such the Plaintiffs are resident outside the Scheduled Territories as defined by the Exchange Control Act 1947.

This Writ was issued by Hill, Dickinson & Co.
of 3/6, Bury Court, St. Mary Axe, LONDON EC3A 5AB

[~~Argentine~~
of



Solicitors for the said Plaintiffs whose address is care of 135, East 42nd Street
New York 10017 New York, U.S.A.

This Writ was served by me at

on

on

by (6)

, the

day of

19

(5) State manner
of service.

(Signed)

(Address)

This is the Exhibit marked "B" mentioned and referred to in the annexed Affidavit of CEDRIC G. HARRIS sworn this 2nd day of February 1972.

Before me :

J. Malcolm Waugh
Notary Public
London, England
(J. Malcolm Waugh)

In the High Court of Admiralty
ADMIRALTY
The Ship "PARACAS"

THE OWNERS OF AND SHIP
"TEXACO CARIBBEAN"

V.

THE MOTOR VESSEL
"PARACAS"

WRIT IN ADMIRALTY
ACTION IN REM

Dated	1972 .
Served	1972 .
Appearance entered	19 .

Hill, Dickinson & Co.,
3/6, Bury Court,
St. Mary Axe,
LONDON EC3A 5AB

Agent for
22

Plaintiff's Solicitor

Exhibit C—(Annexed to Affidavit of Cedric G. Harris)

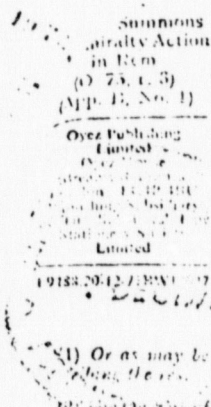
Writ

(Motor Vessel Paracas)

(Mounted Opposite)

In the High Court of Justice

QUEEN'S BENCH DIVISION AND ADMIRALTY COURT
ADMIRALTY action in rem against:



The Ship (1) "TEXACO CARIBBEAN"

(2) THE OWNERS OF THE MOTOR VESSEL
"PARACAS"

PLAINTIFFS

AND

The Owners of (3) THE STEAM TANKER
"TEXACO CARIBBEAN"

DEFENDANTS

Elizabeth the Second, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other realms and territories Queen, Head of the Commonwealth, Defender of the Faith: To the [Owners of ~~and the motor vessel~~ the Ship
"TEXACO CARIBBEAN"

of the Port of PANAMA



(4) Or Cargo, etc.,
as may be.

WE COMMAND YOU that within 14 days after the service of this Writ, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of the Owners of the motor vessel "PARACAS".

and take notice that in default of your so doing the Plaintiffs may proceed therein, and judgment may be given in your absence, and if the res described in this Writ is then under arrest of the Court it may be sold by order of the Court.

Witness, GUNTIN McCAREL BARN HALLSHAM OF
ST. MARYLEBONE Lord High Chancellor of Great Britain,
the 7th day of December 1972.

NOTE.—This Writ may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The Defendants may enter an appearance in person or by a Solicitor either (1) by handing in the appropriate forms duly completed, at the Admiralty Registry, Royal Courts of Justice, Strand, London WC2A 2LL, or (2) by sending them to that office by post. The appropriate forms may be obtained by sending a postal order for 5p with an addressed envelope, 100-mm size, to the Clerk of Accounts, Vote Office Royal Courts of Justice, Strand, London WC2A 2LL.

[OVER

~~STATE~~

THE PLAINTIFFS' ~~XXXXXXXXXX~~ as Owners of the motor vessel "PARACAS"
and as bailees of her cargo claim compensation from the owners
of the steam tanker "TEXACO CARIBBEAN" for loss and damage
arising out of or occasioned by a collision between the Plaintiff
ship "PARACAS" and the Defendants' ship "TEXACO CARIBBEAN" on or
about the 11th day of January 1971 in the Dover Strait by reason
of the negligence of the Defendants, their servants or agents
whereby the Plaintiffs' have suffered loss and damage.

The Plaintiffs address is as shown below and as
such the Plaintiffs are resident outside the scheduled territories
as defined by the Exchange Control Act 1947.

This Writ was issued by Ince & Co.
of 11, Byward Street, London EC3R 5EN

[Agent for
of
Solicitor for the said Plaintiffs whose address is
Rufino Torrico 862, Lima, Peru.]

This Writ was served by me at

on
on , the day of 19
by (*)

(5) State manner
of service.

(Signed)

(Address)

This is the Exhibit marked "C" mentioned and referred to in the annexed Affidavit of CEDRIC G. HARRIS sworn this 2nd day of February 1973.

Before me :

Malcolm Waugh
#11:15.

Notary Public
London, England
(J. Malcolm Waugh)

In the High Court of Justice
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
ADMIRALTY action in rem
The Ship

THE OWNERS OF THE
VESSEL "PARACAS"

V.

THE OWNERS OF THE STEAM
TANKER "TEXACO CARIBBEAN"

WRIT IN ADMIRALTY
ACTION IN REM

Dated

Served

Appearance entered

~~EXHIBIT~~
XX

Ince & Co.
11, Byward Street
EC3R 6EN
Plaintiffs' Solicitors

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Admiralty 1

In the High Court of Justice

Writ of Summons
Admiralty Action
in Rem
(O. 15, r. 3)
(App. B, No. 1)

QUEEN'S BENCH

DIVISION. ADMIRALTY COURT

ADMIRALTY action in rem against personam

The Solicitors
Law Society
Limited
Over House
Breams Buildings
Fetter Lane
London E.C. 4
and at
Birmingham
Cardiff
Liverpool
Manchester
and
Glasgow

~~XXXXXXXXXXXX~~

(2) BETWEEN:

HAPAG LLOYD A-G

PLAINTIFFS

AND

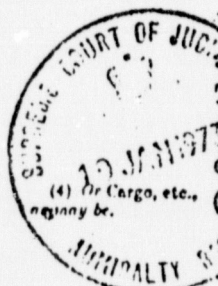
(1) Or as may be
describing the res.

(2) The Owners of
the Ship "Y" or as
may be.

(3) The Ship "X"
or as may be
describing the res.

~~XXXXXXXXXXXX~~ THE MASTER WARDENS AND ASSISTANTS OF THE
GUILD, FRATERNITY, OR BROTHERHOOD OF THE MOST GLORIOUS
AND UNDIVIDED TRINITY AND OF ST. CLEMENT IN THE PARISH
OF DEPTFORD STROND IN THE COUNTY OF KENT, COMMONLY CALLED
THE CORPORATION OF THE TRINITY HOUSE OF DEPTFORD STROND.
DEFENDANTS

Malhofer.



Elizabeth the Second, by the Grace of God, of the United
Kingdom of Great Britain and Northern Ireland and of Our other Realms
and Territories Queen, Head of the Commonwealth, Defender of the Faith;
To ~~XXXXXXXXXXXX~~
The Corporation of Trinity House of Deptford Strond
of ~~XXXXXXXXXXXX~~
House, Tower Hill,
Trinity Square, London E.C.3.



B.1.

12.49

WE COMMAND YOU that within 14 days after the service of this Writ,
inclusive of the day of service, you do cause an appearance to be entered
for you in an action at the suit of
Hapag-Lloyd A-G

and take notice that in default of your so doing the Plaintiffs may proceed
therein, and judgment may be given in your absence, and if the res
described in this Writ is then under arrest of the Court it may be sold by
order of the Court.

Witness, Quintin McGarel Baron Hailsham of St. Marylebone
Lord High Chancellor of Great Britain,
the 10th day of January 1973

NOTE.—This Writ may not be served later than 12 calendar months beginning with the above
date unless renewed by order of the Court.

EXHIBIT "D"

ONLY COPY AVAILABLE

THE PLAINTIFFS' CLAIM is for damages and loss arising out of a collision between the Plaintiffs' ship "BRANDENBURG" and the wreck of the ship "TEXACO CARRIBEAN" on the 12th January 1971 in consequence of the negligence and/or nuisance of the Defendants and/or their servants and/or their agents.

The Plaintiffs reside outside the Scheduled Territories as defined in the Exchange Control Act, 1947

This Writ was issued by Messrs Bentleys, Stokes & Lowless,
of 17 St. Swithins Lane, London EC4N 8AP

[Signature]

of

Solicitors for the said Plaintiffs whose address is
the Republic of West Germany.

BALLINDAMM 25, 2000 Hamburg 1

This Writ was served by me at

on

on

by (*)

the

day of

19

(5) State manner
of service.

ONLY COPY AVAILABLE

**Affidavit of William J. Clayton in Support of Motion to
Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM J. CLAYTON, being duly sworn, deposes and says:

1. I am the Secretary of Texaco Inc. (hereinafter Texaco) a Delaware Corporation having a principal place of business at 135 East 42nd Street, New York, New York. I am familiar with the facts of this case and am making this Affidavit in support of the defendants' Motion for an Order dismissing the Complaints herein.

2. At all times mentioned in the Complaints herein, Texaco Panama Inc. (hereinafter Texpan), a Panamanian Corporation, was the sole owner of the S.T. Texaco Caribbean, a tank vessel registered under the laws of the Republic of Panama.

3. Texaco is not now and never has been the owner, operator or manager of the S.T. Texaco Caribbean nor was it at any of the times mentioned in the Complaints herein, the charterer of the S.T. Texaco Caribbean or the owner of any cargo aboard said vessel.

4. Texaco has never had any control over the S.T. Texaco Caribbean or its crew and did not man, victual or equip, etc. the aforesaid vessel.

Response to Request for Production of Documents

5. Texaco has never had any proprietary interest in the S.T. Texaco Caribbean or any other vessel owned by Texpan, or in the revenue derived therefrom.

6. Texaco does not now, nor did it ever, own, operate, manage, control, act as agent for, man, equip, victual, or in any way have any connection with the German flag vessel, Brandenburg.

/s/ WILLIAM J. CLAYTON

(Sworn to by William J. Clayton on February 16, 1973.)

**Texaco Defendants' Response to Vessel & Cargo's
Request for Production of Documents**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

(72 Civ. 5009, 5010, 73 Civ. 92, 93, 94, 95,
96, 97, 98, 99, 117, 166 and 182)

It should be pointed out at the outset that defendant objects to the production of any of the documents requested by plaintiffs. None of the requested documents pertain to the issue of *forum non conveniens* which is the only issue now before the court. All of the documents are concerned with *in personam* jurisdiction, which is not in dispute and with the merits of the litigation. By prematurely seeking discovery on the merits at this juncture of the litigation, plaintiffs are attempting to circumvent the very purpose of defendant's long outstanding Motion to Dismiss on

*Texaco Defendants' Response to Vessel & Cargo's Request
for Production of Documents*

grounds of *forum non conveniens*; are attempting to harass the defendant; are attempting to avoid responding to defendant's Motion; are attempting to entice the Court into retaining jurisdiction by avoiding the sole issue now pending before it; and are attempting to bootstrap themselves into a more favorable position at the expense and inconvenience of both the defendant and the Court. Plaintiffs, by requesting the production of documents not located in the United States, are engaging in harassment, vexation and a waste of both the Court's and this defendant's time and money.

1. The documents requested are completely irrelevant to the issue of *forum non conveniens*, which is the only issue presently before the Court. Issue of *in personam* jurisdiction over this defendant is not before the Court. In fact, defendant's Motion to Dismiss for *forum non conveniens* presupposes the existence of *in personam* jurisdiction.

2. See objection No. 1 above. In addition, these documents are not located in the United States and it would present an unnecessary and expensive burden on defendant to require their production.

3. Such documents, if any exist, are concerned solely with the merits of these actions and are not relevant to the issue of *forum non conveniens*. Plaintiffs do not need these documents to prepare their answering papers. Request amounts to harassment.

4. Not relevant. See objection No. 3 above. In addition, these documents are all located in England and Monaco. It would amount to an undue and oppressive hardship if defendant were required to produce these documents.

*Texaco Defendants' Response to Vessel & Cargo's Request
for Production of Documents*

5. Documents pertain to the merits of the litigation and possibly the issue of *in personam* jurisdiction, neither of which is before the Court. In addition, the documents are located outside of the United States. See objections Nos. 1 and 3 above.

6. Clearly this request pertains to the merits and involves documents which plaintiff knows are located outside of the United States. See objection No. 3 above.

7. Not relevant. Located outside United States. See objection No. 6 above.

8. See Objection No. 6 above.

9. See objection No. 6 above.

10. See objection No. 6 above.

11. See objection No. 6 above.

12. See objection No. 6 above.

13. See objection No. 5 above.

14. See objection No. 6 above.

15. Not relevant. Privileged document. See objection No. 6 above.

16. See objection No. 15 above.

17. See objection No. 6 above.

Dated: New York, New York
May 9, 1973

*Texaco Defendants' Motion for Protective Order Denying
Vessel & Cargo's Discovery Requests*

Yours etc.,

POLES, TUBLIN, PATESTIDES & STRATAKIS

By: /s/ ALVIN L. STERN

A Member of the Firm

Attorneys for Defendants.

37 Wall Street

New York, New York 10005

944-0580

To: HAIGHT, GARDNER, POOR & HAVENS

One State Street Plaza

New York, New York 10004

MESSRS. FUCHSBERG & FUCHSBERG

250 Broadway

New York, New York

**Texaco Defendants' Motion for Protective Order
Denying Vessel & Cargo's Discovery Requests**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5009, 5010, 73 Civ. 92, 93, 94, 95,

96, 97, 98, 99, 117, 166 and 182) /

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that on the annexed affidavit of ALVIN L. STERN, sworn to on the 10th day of May, 1973, and upon the pleadings and proceedings heretofore had herein, the undersigned will move this Court at Room 2201, United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 23rd day of May, 1973 at 10 A.M. or as soon thereafter as counsel can

*Texaco Defendants' Motion for Protective Order Denying •
Vessel & Cargo's Discovery Requests*

be heard for an Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure directing that the plaintiffs' (Hapag Lloyd A.G. and Stork Amsterdam N.V. et al) (a) Request for Production of Documents under Federal Rules of Civil Procedure, Rule 34 and (b) Interrogatories issued pursuant to Federal Rules of Civil Procedure, Rule 33, both dated April 13, 1973 and addressed to defendant Texaco Panama Inc. be (1) vacated and that the discovery requested therein not be allowed, (2) that discovery be stayed pending a decision on defendant's Motion to dismiss dated March 2, 1973, or in the alternative, (3) that discovery be limited to the issues presented to the Court by defendant's Notice of Motion to dismiss.

Dated: New York, New York
May 11, 1973

Yours etc.,

POLES, TUBLIN, PATESTIDES & STRATAKIS

By /s/ ALVIN L. STERN

Member of the Firm

Attorneys for Defendants

Office and P.O. Address

37 Wall Street

New York, New York 10005

(212) 944-0580

To: HAICHT, GARDNER, POOR & HAVENS

Attorneys for Plaintiffs, Hapag

Lloyd, Stork Amsterdam, et al

One State Street Plaza

New York, New York 10004

FUCHSBERG & FUCHSBERG

Attorneys for Plaintiffs,

Thomas I. Fitzgerald, etc.

250 Broadway

New York, New York

Affidavit of Alvin L. Stern in Support of Motion

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

72 Civ. 5008 CMM (and consolidated cases
72 Civ. 5009, 5010, 73 Civ. 92, 93, 94, 95,
96, 97, 98, 99, 117, 166 and 182)

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALVIN L. STERN, being duly sworn, deposes and says:

1. I am a member of the firm of Poles, Tublin, Pates-
tides and Stratakis, attorneys for the defendant, Texaco
Panama Inc. and am familiar with all the pleadings and
proceedings heretofore had in this matter.

2. That this Affidavit is submitted in support of de-
fendant's Motion for an Order (1) denying, (2) staying
or (3) limiting the scope of plaintiff's discovery at this
juncture of the litigation.

3. That these actions arise out of the collision on
January 11, 1971 between the Peruvian vessel, Paracas,
and the Panamanian vessel, Texaco Caribbean, and the sub-
sequent allision on January 12, 1971 between the German
vessel, Brandenburg and the wreck of the Panamanian
vessel, Texaco Caribbean, in the English Channel, Straits
of Dover, within 12 miles of the English Coast.

4. That plaintiff, Hapag-Lloyd A.G. in Action 73 Civil
166 seeks damages against defendant, Texaco Panama Inc.
(a) as owner, for the loss of the M.V. Brandenburg, and
(b) as bailee, for loss of the cargo aboard the M.V. Brand-

Affidavit of Alvin L. Stern in Support of Motion

enburg. That plaintiff, Stork Amsterdam N.V. et al in Action 73 Civil 182 seeks damages against defendant, Texaco Panama Inc. for the loss of cargo carried aboard the M.V. Brandenburg.

5. That on March 2, 1973 defendant, Texaco Panama Inc., by its attorneys moved this Court for an Order pursuant to Rules 12 and 56, Federal Rules of Civil Procedure, dismissing, insofar as these plaintiffs are concerned, these two actions, solely on the grounds of *forum non conveniens*.

6. That pursuant to the request of plaintiffs' attorneys, defendant agreed to extend the time within which plaintiffs were to submit answering papers in opposition to defendant's, Motion from March 14, 1973 to April 9, 1973 and thereafter in response to a second request extended said time from April 9, 1973 to and including May 21, 1973.

7. That the above mentioned extensions were granted on representations by plaintiffs' attorneys that they required additional time within which to submit answering papers.

8. That instead of using the time as extended to prepare answering papers, plaintiffs' attorneys obviously utilized said time to compile a lengthy, burdensome, oppressive and harassing set of ninety-two Interrogatories (containing numerous subdivisions) typed on 22 pages of legal cap (Exhibit "A") and in addition, a Request for the Production of voluminous documents (Exhibit "B"). None of the requested discovery is in any way relevant to the issues presently before this Court i.e., *forum non conveniens*. Rather the discovery concerns primarily the merits of the litigations.

Affidavit of Alvin L. Stern in Support of Motion

9. That defendant's Motion to dismiss was made specifically to avoid the unnecessary expense, inconvenience and burden entailed in obtaining information from England and in transporting documents back and forth across the Atlantic Ocean. This burden would now be placed on defendant if plaintiffs are permitted to prematurely pursue discovery on the merits at this point of the litigation.

10. That by attempting to obtain discovery concerned to a large degree with the merits at this time and in this forum plaintiffs are harassing the defendants and are in effect, short circuiting and avoiding responding to defendant's Motion. They are creating the very problems which defendant's Motion was designed to avoid and cure, and are attempting to bootstrap their way into Court.

11. That defendant, in order to properly answer the Interrogatories, would have to obtain the vast majority of the required information from counsel in England where the matter was investigated and where prior litigation was commenced and is now pending.

12. That almost all of the numerous documents requested are presently located in England and Monaco and could only be gathered together and transported to the United States at great expense and inconvenience to defendant.

13. That plaintiffs do not require the requested information in order to submit answering papers to defendant's Motion. Almost all of the requested information pertains to the merits of the litigation and none of the requested information or documents are relevant to the issue of *forum non conveniens* now pending before this Court.

Affidavit of Alvin L. Stern in Support of Motion

14. That as an example of the above, plaintiffs have requested the production of, amongst others, the following documents:

(a) copies of all bills of lading, port logs, statements of fact, customs declarations, etc. given to, issued by or otherwise prepared by or on behalf of the Texaco Caribbean during her call at Terneuzen.

(b) copies of all documents with regard to any communications by or on behalf of the defendant with Trinity House, London concerning the loss of the Texaco Caribbean.

(c) copies of all documents in the nature of notes, private memoranda, or other informal records of the investigations into the subject casualties, which investigation was conducted in England at the scene of the casualties.

(d) copies of all messages sent by the Texaco Caribbean following her departure from last port until her loss.

Clearly, these documents have nothing whatsoever to do with the question of whether it would be more convenient to litigate this matter in England. In fact, the documents requested all go to the merits of the action rather than to the threshold question of what is the appropriate Court for this litigation. The above are only meant to serve as examples and defendant's specific objections to plaintiffs' Request for Production of Documents have been set forth in Exhibit "C" attached hereto and made a part hereof.

15. That in addition to the documents requested as stated in the preceding paragraph, plaintiffs have asked

Affidavit of Alvin L. Stern in Support of Motion

numerous Interrogatories of a similar import, the answers to which would require the defendant to review numerous and voluminous documents not located in this jurisdiction, and would require extensive and detailed answers—all again going to the merits. For specific objections to each of plaintiffs' Interrogatories please refer to Exhibit "D" attached hereto and made a part hereof.

16. That furthermore, many of plaintiffs' Interrogatories requested detailed information regarding defendant's corporate arrangements none of which information is relevant when *in personam* jurisdiction is not being disputed and the only issue before the Court is that of *forum non conveniens*. In fact, even were defendant (Texpan) a New York corporation with a New York office, which it is not, such would not change the fact that the most convenient forum for the trial of this action is in England where all the witnesses, documents, etc. are located, where the subject casualties occurred, and more importantly, where other *indispensable* parties are located and prior actions are pending.

17. That the plaintiffs had, prior to the commencement of these actions, already commenced similar actions in England.

18. That all of the requested discovery could, therefore, be obtained in England at comparatively much less expense and inconvenience, for which reason, amongst others, defendant has moved to dismiss these actions.

19. That it is apparent from all the above that plaintiffs are merely attempting to harass the defendants and to unnecessarily subject the defendants to exorbitant expense and much inconvenience.

Affidavit of Alvin L. Stern in Support of Motion

20. That if the Court now permits plaintiffs to proceed with the requested discovery and yet orders these actions dismissed (and plaintiffs relegated to their proper forum in England) all would have gone for naught. The defendant will have been forced to perform a futile act resulting in much duplication of effort and enormous and unnecessary expense.

21. That, as stated above, a favorable decision on defendant's Motion would render the requested discovery moot and that, therefore, a decision on defendant's Motion should not be delayed any further in order to permit plaintiffs to proceed with the requested discovery.

22. That the purpose of discovery is to "narrow the issues" and that where, as here, the issues are clearly stated—there being no dispute as to the essential and material facts to be considered by the Court on the *sole* issue of *forum non conveniens*—there is no necessity for discovery to be had prior to this Court's determination of the sole issue now before it.

23. That in summary, none of the discovery sought is necessary for the proper disposition of defendant's Motion to dismiss for *forum non conveniens*. In fact, the granting of such discovery would of necessity presuppose the denial of defendant's Motion which as of yet has not been decided by this Court. The sole issue of *forum non conveniens* and the undisputed facts which have been more fully outlined in defendant's Motion requires that this Court first makes its determination of a long outstanding Motion before requiring the defendant to engage in expensive acts which may ultimately turn out to be futile.

*Vessel & Cargo's Order to Show Cause
with Stay of 18 May 1973*

WHEREFORE, it is respectfully requested that plaintiff be denied discovery at this juncture of the litigation; that all discovery be stayed pending this Court's determination on defendant's Motion to dismiss; or in the alternative that plaintiff only be permitted discovery on the narrow issue of *forum nonconveniens* now pending before this Court.

/s/ ALVIN L. STERN

(Sworn to by Alvin L. Stern on May 10, 1973.)

**Vessel & Cargo's Order to Show Cause with
Stay of 18 May 1973**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(72 Civ. 5009, 5010, 73 Civ. 92, 93, 94, 95,
96, 97, 98, 99, 117, 166 and 182 CMM)

[SAME TITLE]

NOW UPON the annexed affidavit of MacDonald Deming, Esq., and supporting Memorandum of Authorities,

IT IS HEREBY ORDERED that defendant Texaco Panamā, Inc. is to show cause before a Judge of this Court in Room 906, United States Courthouse, Foley Square, Manhattan, on Tuesday, the 22nd day of May, 1973, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an Order should not be handed down herein providing as follows:

*Vessel & Cargo's Order to Show Cause
with Stay of 18 May 1973*

1. Setting Thursday, June 7, 1973 as the date for hearing of defendant Texaco Panama, Inc.'s motion under FRCP Rule 26(c) for a protective order;

2. Setting Thursday, June 7, 1973 as the date for hearing of a motion to be made by plaintiffs Hapag-Lloyd, and Stork Amsterdam, N.V., Industrias Lacteas Dominicanas, S.A. (Indulac), et al., under FRCP Rule 37(a)(2), to compel discovery, provided service of the moving papers therein be made conformably to General Rule 9 and The Federal Rules of Civil Procedure; and

3. Setting the date for service of papers in response to defendant Texaco Panama, Inc.'s motion, dated March 2nd, 1973, for dismissal of plaintiffs' actions on grounds of *forum non conveniens*:

(i) for a day thirty days following full compliance by defendant Texaco Panama, Inc. with plaintiffs' discovery demands, if plaintiffs succeed in their motion to compel discovery by said defendant, or;

(ii) for a day five days following service upon plaintiffs of an order denying their motion, if said motion is denied in full;

AND IT IS FURTHER ORDERED that personal service of a copy of this order, and of the papers upon which the same is granted, on Messrs. Poles, Tublin, Patestides & Stratakis, as attorneys for defendants Texaco, Inc. and Texaco Panama, Inc., and upon Messrs. Fuchsberg & Fuchsberg, as attorneys for plaintiff Thomas I. Fitzgerald, Public Administrator, who together with attorneys for movant are all the attorneys concerned in this action, on or before 4:30 P.M., Friday, May 18th, 1973, shall be sufficient service of this order;

*Vessel & Cargo's Order to Show Cause
with Stay of 18 May 1973*

AND IT IS FURTHER ORDERED that all other proceedings in these actions be and hereby are stayed until the hearing and termination of this motion brought on by order to show cause, and the subsequent entry of an order thereupon.

Dated: New York, New York
May 18, 1973.

/s/ CHARLES M. METZNER
U.S.D.J.

To: POLES, TUBLIN, PATESTIDES & STRATAKIS
37 Wall Street
New York, N.Y. 10005

FUCHSBERG & FUCHSBERG
250 Broadway
New York, N.Y. 10007

HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, N.Y. 10004

**Affidavit of MacDonald Deming in Support of
Application for Order to Show Cause**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008, and consolidated cases 72 Civ. 5009, 5010,
73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166
and 182 CMM

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MACDONALD DEMING, being duly sworn, hereby deposes
and says:

1. I am a member of the firm of Haight, Gardner, Poor
& Havens, attorneys for plaintiffs Hapag-Lloyd A.G. and
Stork Amsterdam, N.V., et al, and am familiar with all the
pleadings and proceedings heretofore had in this matter.
This affidavit is submitted in support of plaintiffs' applica-
tion for an order to show cause made this date.

2. These actions arise out of the collision on January
12, 1973 of the German vessel Brandenburg with the un-
buoyed and unmarked wreckage of the Texaco Caribbean
on the high seas, where said wreckage lay following a col-
lision on January 11 1971 between the Peruvian vessel
Paracas and the Texaco Caribbean.

3. Plaintiff Hapag-Lloyd A.G. seeks damages from de-
fendant Texaco Panama, Inc. for the loss of the m/v Bran-
denburg [and, as bailee, for the loss of the cargo laden
aboard her]. Plaintiffs Stork Amsterdam, N.V. seek dam-
ages from defendant Texaco Panama, Inc. for the loss of
their cargo carried aboard the m/v Brandenburg.

*Affidavit of MacDonald Deming in Support of
Application for Order to Show Cause*

4. The suit of Hapag-Lloyd A.G. was commenced on January 9, 1973, and an amended complaint in that action was filed on January 11, 1973, service of both complaints being effected on January 16, 1973. The suit of Stork Amsterdam, N.V., et al., was commenced on January 10, 1973, and service in that action was also effected on January 16, 1973.

5. Plaintiffs Hapag-Lloyd A.G. and Stork Amsterdam, N.V., et al., consented to extend the time within which defendant might move, answer or otherwise appear in the matter, and during such extension of time defendant Texaco Panama, Inc. brought forward a motion to consolidate the several actions arising out of the casualty and brought in this District for all purposes, which motion was consented to by affidavit of the attorneys of the above-mentioned plaintiffs.

6. Thereafter defendant caused to be served on plaintiffs' attorneys a Notice of Motion, with supporting Affidavit and Memorandum of Law, dismissing the complaints on grounds of *forum non conveniens*.

7. Plaintiffs were required by the service of that Notice of Motion to serve their answering papers by March 9, 1973, but the period within which plaintiffs could reply was extended to April 9, 1973.

8. On March 21, 1973, Emil A. Kratovil, Jr. (associated with attorneys for plaintiffs) telephoned John J. Devine (associated with attorneys for Texaco Panama, Inc.) and advised that plaintiffs would need written discovery from Texaco Panama, Inc. in connection with their opposition to Texaco Panama's motion to dismiss, and to ask whether it might be possible informally to set a date for

*Affidavit of MacDonald Deming in Support of
Application for Order to Show Cause*

depositions of suitable Texaco Panama personnel by plaintiffs, to follow the written discovery. Mr. Devine called back later that day, and advised Mr. Kratovil that no consent to informal arrangements regarding depositions could be given. He did, however, in a subsequent conversation with David E. Novitski (also associated with attorneys for plaintiffs) extend to May 21, 1973, the time in which plaintiffs could reply.

9. On April 13, 1973, plaintiffs served upon attorneys for defendant interrogatories pursuant to Rule 33, and requests for discovery and inspection of documents pursuant to Rule 34, asking for materials pertinent to preparation of papers in response to defendant's motion to dismiss on grounds of *forum non conveniens*.

10. On May 14, 1973, defendant's last day to answer interrogatories, and next-to-last day to produce the documents requested for discovery and inspection, and without prior communication with plaintiffs' attorneys concerning the matter, defendant served upon plaintiffs' attorneys "responses" to plaintiffs' interrogatories and requests, consisting solely of denials that discovery and inspection was warranted, and objecting to each and every interrogatory and request, giving no answers or responses thereto.

11. After receipt of defendant's objections, Mr. Kratovil on behalf of plaintiffs contacted Mr. Alvin L. Stern (an attorney for defendant) and inquired of him whether attorneys for defendant would agree to answer any of the interrogatories, or furnish any of the documents demanded by plaintiffs. Mr. Stern said that defendant would answer none of the interrogatories, and furnish none of the documents.

*Affidavit of MacDonald Deming in Support of
Application for Order to Show Cause*

12. Defendant's attorneys in their objections state that not one of the requested documents and not one of the interrogatories is relevant to the issue of *forum non conveniens*, which is patently incorrect. Both interrogatories and requests were drawn with the aim of ascertaining the geographical location of vital evidence. In identifying a vital witness, it is, of course, necessary first to list the central issues, then to ask who has knowledge of them, and finally to inquire where he lives and works. It certainly seems fair that Texaco Panama, Inc. should respond to questions as to the geographical location of vital evidence, a matter of undisputed relevance to *forum non conveniens* questions. It is, for example, difficult to see how defendant's attorneys can object to the following interrogatories as irrelevant to the question of *Forum Non Conveniens*:

"30. What office of TexPan makes decisions on:

* * *

(d) What steps should be taken, if any, to locate and mark a wreck;"

or

"31. Who, if anyone, (name, title and residence address in January 1971, and now) from the New York office at TexPan went to England with regard to the collision between the Texaco Caribbean and Paracas (hereinafter 'the collision')?"

or

"Was TOT [Texaco Overseas Time Ships, a Texaco subsidiary] authorized to employ expert assistance in locating and/or buoying or otherwise mark-

*Affidavit of MacDonald Deming in Support of
Application for Order to Show Cause*

ing the location of the wreck of Texaco Caribbean without checking with TexPan?"

It is correct that plaintiffs' discovery requests relate (unavoidably) to the merits of the case. They must do so in order to find out the name and *location* of the vital witnesses.

13. Attorneys for plaintiffs have received definite indications from third-parties that principal authority of Texaco Panama, Inc. is found, and that vital decisions with regard to the instant casualty were made, in New York.

14. The reason why this application is made by order to show cause is that there was not sufficient time to proceed by regular notice of motion. Defendant's motion for a protective order (dated May 11, 1973) was not served on attorneys for plaintiffs until Tuesday, May 15, 1973. It was, therefore, impossible to give the required five-day notice so as to bring a motion on for hearing until Tuesday, May 22, 1973, the day *after* plaintiffs' papers in opposition to defendant's *forum non conveniens* motion are due.

15. No previous application has been made for this, or similar relief.

/s/ MACDONALD DEMING

(Sworn to by MacDonald Deming on May 18, 1973.)

**Texaco Defendants' Counsel Mr. Stern's Affidavit in
Opposition to Vessel & Cargo's Motion by Order
to Show Cause**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases
72 Civ. 5009, 5010, 73 Civ. 92, 93, 94, 95,
96, 97, 98, 99, 117, 166 and 182)

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALVIN L. STERN, being duly sworn, deposes and says:

1. I am a member of the firm of Poles, Tublin, Pates-
tides & Stratakis, attorneys for the defendant, Texaco
Panama, Inc., and am familiar with all the pleadings and
proceedings heretofore had herein.

2. This affidavit is submitted in opposition to the mo-
tion by plaintiffs, Hapag-Lloyd A.G. and Sterk Amsterdam,
N.V., brought on by order to show cause dated May 18,
1973 seeking to further delay the long outstanding motion
to dismiss made by Texaco Panama, Inc.

3. That from the very inception of these actions, the
defendant, Texaco Panama, Inc., has made it factually
clear to all parties concerned that the most appropriate
forum for trial would be in England. That although
these pertinent facts were made known, as well as the fact
that it would be necessary to obtain affidavits in support of
such a motion to dismiss from locations outside this juris-
diction, this defendant was nevertheless forced to obtain
extensions from this court to complete its preparation of
the aforementioned motion.

*Texaco Defendants' Counsel Mr. Stern's Affidavit in
Opposition to Vessel & Cargo's Motion by Order
to Show Cause*

4. That on March 2, 1973, defendant, Texaco Panama, Inc., served the various parties herein and moved this court for an order pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure seeking to dismiss these actions on grounds of *forum non conveniens*.

5. That pursuant to the request of plaintiffs' attorneys, defendant, Texaco Panama Inc., agreed to extend the time within which plaintiffs were to submit answering papers. Plaintiffs originally were required to serve answering papers on or before March 14, 1973. However, in view of their request, time to submit answering papers in opposition to defendant's motion was extended from March 14, 1973 to April 9, 1973. Thereafter in response to a second request, plaintiffs' time was further extended from April 9, 1973 to and including May 21, 1973.

6. That the above-mentioned extensions were granted on representations by plaintiffs' attorneys that they required additional time within which to submit answering papers. *No extension was ever granted in order to obtain any discovery.*

7. That instead of using the time as extended to prepare answering papers, plaintiffs' attorneys obviously utilized said time to compile a lengthy, burdensome, oppressive and harassing set of ninety-two interrogatories (containing numerous subdivisions) typed on 22 pages of legal cap and in addition, a request for the production of voluminous documents. We do not object to appropriate discovery but none of the requested discovery is in any way relevant to the issue presently before this court, i.e., *forum*

*Texaco Defendants' Counsel Mr. Stern's Affidavit in
Opposition to Vessel & Cargo's Motion by Order
to Show Cause*

non conveniens. Rather the discovery concerns itself primarily with the merits of the litigations.

8. It is quite apparent that the plaintiffs' attorneys herein have not been proceeding in good faith and are, it is submitted, still not proceeding in good faith in this matter. It is also quite apparent that they are attempting to use this court and this motion to further delay and put off the determination by this court the threshold question of *forum non conveniens*. They are attempting to inextricably intertwine this court with the merits of the case when the only matter before this court is whether this court should get involved in the first place.

9. The plaintiffs in their motion papers state that they are entitled to know the location of the witnesses. The defendant, however, has already in their affidavits in support of their motion to dismiss given the geographic location of possible witnesses. As can be seen from those papers, none of the possible witnesses are within the jurisdiction of this court but would come from such places as England or Monaco. Furthermore, defendant in their objections and motion papers in support of a protective order have already informed the plaintiff that they maintain no New York office. See Exhibit "C" to motion papers attached hereto—especially objection 31.

10. It should be pointed out that there is no question as to the material issues to be decided on defendant's motion to dismiss for *forum non conveniens*. For example, there is no question as to where the collision and subsequent collision took place, i.e., in the English Channel, Straits of Dover, within 12 miles of the English Coast.

*Texaco Defendants' Counsel Mr. Stern's Affidavit in
Opposition to Vessel & Cargo's Motion by Order
to Show Cause*

There is no dispute as to the fact that certain indispensable parties are not present here but are present in the English courts i.e. Trinity House, and the owners of the Paracas. There is no question here that Trinity House, an English concern, was engaged to locate and mark the wreck of the Panamanian vessel Texaco Caribbean and that the steps and procedures taken to locate and mark such wreck could only be obtained from information located in England. Furthermore, there is no question here that the crews of all the vessels concerned are foreign nationals not located within the United States. Deponent could easily cite other instances to show why the circumstances of this case require the plaintiffs here not be allowed to have discovery on matters concerning the merits prior to the courts disposition of the *forum non conveniens* question, however, to do so would only add to the unnecessary paperwork of a court which is already overburdened.

11. It should be obvious that these plaintiffs are merely trying to harass the defendant and to use this court as a means of getting information to be later used in the courts of England.

12. When deponent spoke to Mr. Kratovil (associated with the attorneys for the plaintiffs), he advised him that it would be in the best interest of all parties concerned to have this matter litigated in the only forum where all the indispensable parties could be brought together. That any other course of action might lead to inconsistent judgments and the defendant being deprived of its right to assert cross claims against appropriate parties. Deponent also pointed out to Mr. Kratovil that since the plaintiffs

*Texaco Defendants' Counsel Mr. Stern's Affidavit in
Opposition to Vessel & Cargo's Motion by Order
to Show Cause*

were already parties to a prior suit in England, there could be no prejudice to his clients. Mr. Kratovil in turn informed deponent that discovery in the English courts was much more limited than in the United States. This, no doubt is the reason why this *second subsequent* suit was commenced in this district court. Apparently, the plaintiffs would like to take advantage of the more liberal discovery rules of our court while delegating the defendants to a more restrictive discovery.

Not only have the plaintiffs' attorneys not been proceeding in good faith with regard to extensions obtained but, it is submitted, they are using this court as a tool in order to aid them in discovery for use before the courts of England where ultimately all the issues must be resolved.

13. This court, it is submitted, should not be used as a means of obtaining unfair advantage and to delay proper decisions on matters which are clear on their face.

WHEREFORE, it is respectfully submitted that plaintiff's motion brought on by order to show cause dated May 18, 1973 seeking to further delay defendant's motion to dismiss be in all respects denied.

/s/ ALVIN L. STERN

(Sworn to by Alvin L. Stern on May 21, 1973.)

**Vessel & Cargo's Counsel Mr. Deming's Affidavit of
7 June 1973 In Support of Plaintiffs'
Application for Discovery**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

(72 Civ. 5008 CMM and consolidated case
72 Civ. 5009, 5010, 73 Civ. 92, 93, 94, 95,
96, 97, 98, 99, 117, 166 and 182)

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MACDONALD DEMING, being duly sworn, deposes and says:

1. I am a member of the Firm of Haight, Gardner, Poor & Havens, attorneys for plaintiffs Hapag-Lloyd AG and Stork Amsterdam N.V., *et al.*, and am familiar with all the pleadings and proceedings in this case. This affidavit is submitted in support of plaintiffs' application for an order granting them discovery by interrogatories, production of documents and depositions before the argument of defendants' *forum non conveniens* motion.

2. Your deponent is authorized to state that counsel for the interests of deceased crew members of Brandenburg in this consolidated litigation joins in this affidavit and in this application for discovery.

3. These consolidated suits were brought to recover for damages resulting to widows and families of deceased crew members of the German vessel Brandenburg, and for damages resulting from loss of the Brandenburg and her cargo. These losses arose out of the collision on January 12,

*Vessel & Cargo's Counsel Mr. Deming's Affidavit of
7 June 1973 In Support of Plaintiffs'
Application for Discovery*

1971 of the German vessel Brandenburg with the unbuoyed and unmarked wreckage of the Texaco Caribbean on the high seas, where said wreckage lay following a collision on January 11, 1971 between the Peruvian vessel Paracas and the Texaco Caribbean. The suits are based upon the failure of the defendants to locate, mark or buoy the wreckage of the Texaco Caribbean as required by law.

4. Defendants have moved to dismiss all complaints on grounds of *forum non conveniens*. Plaintiffs Hapag-Lloyd and Stork Amsterdam N.V., *et al.*, have served interrogatories and requests for documents upon defendants, which have been objected to in their entirety. The present application by all plaintiffs is for an Order permitting plaintiffs to obtain discovery, from defendants needed to oppose defendants' motion.

5. Plaintiffs' discovery is needed to learn the geographical location of vital evidence and witnesses. To identify these it is necessary first to identify the central merits issues, and then to ask who has knowledge of them and where they live and work, and where relevant documents on these issues are.

6. In following the Court's suggestion plaintiffs have greatly shortened and simplified their written interrogatories and requests, reducing the number of interrogatories from ninety-two to twenty-nine.

7. Plaintiffs have received clear indications that the seat of final corporate authority of Texpan is in New York, and that vital decisions with regard to the wreck of the Texaco Caribbean were made there by Texpan personnel.

*Vessel & Cargo's Counsel Mr. Deming's Affidavit of
7 June 1973 In Support of Plaintiffs'
Application for Discovery*

Discovery is needed in order to obtain information from Texaco Panama Inc. in this respect, and to identify and locate the United States witnesses in Texaco Panama Inc. as to the company's authority and actions in connection with its failure to locate and mark the wreck of the Texaco Caribbean.

8. In order to locate the vital United States witnesses of Texpan it is necessary to inquire as to the functions of Texpan's United States office (interrogatories 1, 2, 3, 4, 5), which plaintiffs believe to have had the major decision-making power and to have taken the major decisions. It is also necessary to inquire as to the authority of Texpan's New York office concerning such matters as locating and marking the wreck of the Texaco Caribbean (interrogatories 6, 7, 11, 12, 13, 17, 18, 21, 28). It is also necessary to inquire what actions and decisions were in fact taken by Texpan's personnel in the United States concerning the locating, marking and buoying of the wreck of the Texaco Caribbean (interrogatories 8, 9, 14, 16, 19, 22, 23, 24, 25, 26). Other interrogatories are directed to the availability in the United States of crew and other Company witnesses (interrogatories 20, 27), and to Texaco's knowledge of other witnesses in the United States (interrogatory 29).

9. Plaintiffs' requests for documents ask for papers showing the location of defendant's offices at the time of the casualties (request 1), its offices and individuals in charge of the Texaco Caribbean at the time of the casualty (request 2, 3, 6, 7, 9, 10, 11 and 12), and its offices and the individuals in charge of wreck location, marking, removal and salvage (request 4).

*Vessel & Cargo's Counsel Mr. Deming's Affidavit of
7 June 1973 In Support of Plaintiffs'
Application for Discovery*

10. Plaintiffs' written discovery is designed to identify United States witnesses. It will also be necessary to have oral depositions of some of the witnesses revealed by the written discovery, in order to have all available information as to location of witnesses and evidence, before defendant's *forum non conveniens* motion is argued.

11. It is respectfully requested that defendants be directed:

(a) to respond to plaintiffs' shortened interrogatories;

(b) to produce the documents demanded in plaintiffs' shortened documents demand; and

(c) to produce for oral examination appropriate witnesses where they have been identified by defendant's refusal to plaintiffs' written discovery.

12. It is also respectfully requested that the time for plaintiffs to file their papers opposing defendants' motion be deferred until a reasonable time after all the above requested discovery has been completed by defendants.

Respectfully submitted,

/s/ MACDONALD DEMING

(Sworn to by MacDonald Deming on June 7, 1973.)

**Revised Interrogatories Issued Pursuant to FRCP
Rule 33**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

72 Civ. 5008 CMM (and consolidated cases
72 Civ. 5009 and 5010, 73 Civ. 92-99, 117,
166 and 182

[SAME TITLE]

Pursuant to Rule 33 of the Federal Rules of Civil procedure, Defendant Texaco Panama, Inc. is required to serve upon attorneys for plaintiffs Hapag-Lloyd (73 Civ. 166) and Stork Amsterdam N.V., Industrias Lacteas Dominicanas S.A. "Indulac", *et al.* (73 Civ. 182) its answers to the following interrogatories, in writing and duly sworn, on or before , 1973.

1. Please identify each office or place of business of Texaco Panama, Inc. (hereinafter referred to as "Texpan"), during the period from November 1, 1967 through March 31, 1968, and during the period from November 1, 1970 through March 31, 1971, stating as to each its full address, the full name and residence address then and now of Texpan's representative in overall charge, and the corporate functions there performed. Please indicate which of the offices so identified is Texpan's main office, and which is its registered office.

2. If Texpar presently has a Board of Directors, please state the full names, and business and home addresses then and now, of the members of the Board from November 1, 1967 through March 31, 1968, and from November 1, 1970 through March 31, 1971; please also identify the place of

Revised Interrogatories Issued Pursuant to FRCP Rule 33

each meeting of the Board from November 1, 1967 to date, identifying for each meeting the names of the Directors attending.

3. If Texpan has been authorized to transact business in the State of New York, please identify the date of the initial authorization, and state whether that authorization is still in effect.

4. Please set out all telephone listings in the State of New York of Texpan, from December 1, 1970 through February 28, 1971, indicating telephone numbers and addresses listed.

5. Please identify, by office address, the Texpan office(s) responsible from December 1, 1970 through February 28, 1971 for the following operations:

- a. ship manning;
- b. ship supplies;
- c. vessel accounting;
- d. payment/receipt of charter hire;
- e. matters pertaining to charterparty terms;
- f. port arrangements;
- g. wreck location;
- h. wreck removal; and
- i. salvage of Texpan vessels.

6. Who in these offices decides, or has power to decide:
- (a) whether charter parties should be entered into for Texpan vessels;

Revised Interrogatories Issued Pursuant to FRCP Rule 33

- (b) what terms should be included in Texpan charter parties;
- (c) whether salvage, or wreck removal, was to be undertaken with regard to Texaco Caribbean;
- (d) the terms of any salvage or wreck removal contracts regarding the wreck of the Texaco Caribbean;
- (e) what steps were to be taken, if any, to locate and/or mark the wreck of the Texaco Caribbean; and
- (f) what steps, if any, were to be taken to clear oil from the area of the wreck of the "Texaco"?

7. Please identify the individuals who on behalf of Texpan (1) supervised negotiation of the terms of, and (2) signed the charterparty under which the M/V Texaco Caribbean was operating at the time of her loss, stating as to each individual his job title, full name, and office and residence addresses then and now.

8. If Texpan—or anyone on its behalf, had any discussions relative to locating, marking or removing the wreck of the Texaco Caribbean, please state where and when each discussion was held, who participated in it, and what actions were taken by Texpan, if any, as a result. If any officer, director or employee of Texpan then residing in the United States participated in, supervised, or was requested to give authority for any action as a result of these discussions, please identify him by full name, job title, and office and residence addresses then and now.

9. Please identify by name, job title and residence and business addresses then and now, each officer, director, or

Revised Interrogatories Issued Pursuant to FRCP Rule 33

employee of Texpan, who took any action or participated in any decision with regard to the loss of the M/V Texaco Caribbean, including but not limited to:

- a. receiving notice of the collision between the M/V Texaco Caribbean and the M/V Paracas, the subsequent loss of the M/V Texaco Caribbean, and the collision between the M/V Brandenburg and the M/V Texaco Caribbean;
- b. notifying the Texaco Caribbean's hull underwriters and P&I Club of any of the casualties;
- c. attempting to locate the positions of
 - i. the Texaco Caribbean/Paracas collisions;
 - or
 - ii. the Texaco Caribbean/Brandenburg collision
- d. attempting to locate the wreck of either the M/V Texaco Caribbean or the M/V Brandenburg;
- e. releasing information to the public or to the press concerning any of the casualties;
- f. communicating, or supervising communication, as a result of any of the casualties, with:
 - i. Trinity House;
 - ii. towage or salvage organizations;
 - iii. any government, or any government department, agency, *etc.*

10. Please state the residence and business addresses of Mr. Robert R. Dimock, President of Texpan, at present, and on January 11, 1971.

Revised Interrogatories Issued Pursuant to FRCP Rule 33

11. Please state the full names, residences, addresses then and now, and job titles of all Texpan officers and employees who worked at Texpan's office at V.R. Transismica, Panama, R.P., in January, 1971.

12. Please state the average daily volume of mail sent and received at Texpan's mailing address at Apartado 3104, Panama 3, Panama in January, February and March, 1971.

13. Please state the average daily volume of mail sent and received by Texpan in New York, New York in January, February and March, 1971.

14. If anyone working on behalf of Texpan in New York, New York at the time of the casualties went to England in connection with either the collision between the Texaco Caribbean and Paracas, or between the Brandenburg and the wreck of the Texaco Caribbean, please state as to each such person:

- (a) when he went;
- (b) how long he stayed;
- (c) his full name, and residence address then and now; and
- (d) what he did.

15. Mr. E. F. Pointon, in his affidavit of February 5, 1973 (attached as an Exhibit to Texpan's Notice of Motion dated March 2, 1973) states at paragraph 6 that "[i] mmediately after the Paracas/Texaco Caribbean collision and subsequent Brandenburg allision various employees of TOT in England followed the operations being performed by the Corporation of Trinity House that were concerned with locating and marking the wrecks." Please state the full name, job title, and business and residence addresses of each such employee then and now, identifying as to each:

- (a) what he did;

Revised Interrogatories Issued Pursuant to FRCP Rule 33

- (b) when and where he did it; and
- (c) when, to whom, and in what form he reported his observations. If his report was oral, please state its substance; if in writing, a copy may be attached in lieu of an answer to this sub-part.

16. If any person was ever notified on behalf of Texpan in New York, New York either of the collision between the Texaco Caribbean and Paracas, or of the collision between the Brandenburg and the wreck of the Texaco Caribbean, please identify him by full name, job title, and his office and business addresses then and now. If the notice was oral, please state its substance; if in writing, please attach a copy.

17. Please state the address of each office of Texpan with the power in January 1971 to authorize the employment of expert assistance to locate, mark, or salvage the wreck of the Texaco Caribbean.

18. Please state the address of each office of Texpan with the power in January 1971 to pay for any steps taken to locate, mark, or salvage the wreck of the Texaco Caribbean, or her cargo.

19. If TOT communicated with any office of Texpan regarding locating, marking, or salvaging the wreck of the Texaco Caribbean or her cargo, please summarize the nature of the communication, and identify (by full name, job title, and business and residence addresses then and now) the parties who participated in the communication for TOT and Texpan, and the date, time and place of the communication; if any action was taken as a result, describe that action. If any such communication was in writing, copies may be attached to your answers in lieu of a description.

Revised Interrogatories Issued Pursuant to FRCP Rule 33

20. Please state the name, rank or rating, job title and residence addresses on January 11, 1971 and at present, of each member of the crew of the Texaco Caribbean who survived the collision with the Paracas, and state whether each survivor was on watch at the time of the collision. With regard to each survivor presently serving aboard ship, please identify his ship.

21. Please set out in detail each and every term of the Ship Management Agreement in effect between Texpan and TOT on January 11, 1971; or, in lieu thereof, attach a copy of said Agreement to your answers.

22. If Texpan, or anyone on its behalf, took any action, or made any decision between 0000, January 11, 1971 and 0000, January 15, 1971 (British time) to have or not to have any sea- or air-craft to locate, mark, or salvage the wreck of the Texaco Caribbean, or warn passing vessels of the wreck's presence, please state the date, time and place the request was made, and by and to whom. If oral, please summarize each request; if written, please attach copies thereof to your answers.

23. If any steps were taken, or decisions made, by Texpan between January 10th and January 28th of 1971 concerning the locating, marking or salvaging the wreck of the Texaco Caribbean, or her cargo, please identify by full name, job title, and business and residence addresses then and now the individual taking such steps or making such decisions, and state when and where they were taken or made, and what they were.

24. If such steps were taken or decisions made, please identify by full name, job title and business and residence addresses then and now the officer, director or employee of Texpan who authorized the taking of such steps.

Revised Interrogatories Issued Pursuant to FRCP Rule 33

25. Please state, with regard to all messages passing between Texpan and TOT during the period January 10-28, 1971 concerning the Paracas/Texaco Caribbean and Texaco Caribbean/Brandenburg collisions, the names and business and residence addresses then and now of the persons from whom and to whom each message was sent, the date, time and place received, and summarize the substance of each. Copies of all such messages may be attached to your answers, in lieu of answering at length.

26. If the wreck of the Texaco Caribbean has ever been abandoned by Texpan, please state:

- a. Who decided on behalf of Texpan that abandonment should be made (full name, job title, and business and residence addresses then and now);
- b. By which office of Texpan abandonment was formally announced;
- c. To whom abandonment was made;
- d. The date, time and place of formal announcement of the abandonment; and
- e. The terms in which made—if oral, please state the substance of the abandonment, if written, please produce a copy thereof in lieu of detailed answer.

27. Please state how many vessels owned or chartered by Texpan touched the Port of New York from December 1st, 1970 to February 28, 1971; and during the month of January, 1973.

28. Please set out completely each listing of Texpan, as owner of any vessels, in any publications issued by Lloyd's Register, Bureau Veritas, Det Norske Veritas, or

Revised Interrogatories Issued Pursuant to FRCP Rule 33

the American Bureau of Shipping from December 1, 1967 to date. In lieu of setting out each entry at length in your answers, you may attach copies of all entries.

29. Please state the full names, job titles, and office and residence addresses then and now, of *all* witnesses to actions, decisions or communications concerning the locating, marking, salvaging or abandoning of the Paracas, Texaco Caribbean or Brandenburg presently known to Texpan or its attorneys, and not already identified in Texpan's answers to the above interrogatories.

June 7, 1973

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS

By /s/ MACDONALD DEMING

MacDonald Deming

A Member of the Firm

Attorneys for Plaintiffs Hapag-Lloyd,
and Plaintiffs Stork Amsterdam N.V., et al.
One State Street Plaza
New York, N.Y. 10004
212-344-6800

To: MESSRS. POLES, TUBLIN, PATESTIDES & STRATAKIS
Attorneys for Defendant Texaco Panama, Inc.
37 Wall Street
New York, N.Y. 10005
944-0580

FUCHBERG & FUCHSBERG
Attorneys for Personal Injury Plaintiffs
250 Broadway
New York, N.Y.
WO 2-2800

**Revised Request for Production of Documents Under
FRCP Rule 34**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases 72 Civ. 5009,
5010, 73 Civ. 92, 99, 117, 166 and 182)

[SAME TITLE]

PLEASE TAKE NOTICE, that plaintiffs Hapag-Lloyd A/G (73 Civ. 166) and Stork Amsterdam N.V.; Industrias Lacteas Dominicanas S.A. "Indulac", *et al.* (73 Civ. 182), by their counsel Haight, Gardner, Poor & Havens, request that defendant Texaco Panama, Inc. serve, on or before , 1973, its written response to plaintiffs' request that the following designated "documents" (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated if necessary, by defendant through detection devices into reasonably usable form, and in defendant's possession or otherwise available to or under the control of said defendant) be produced for inspection and copying by counsel for plaintiffs on or before noonday, , 1973, in Conference Room 1, 22nd Floor, One State Street Plaza, New York, N.Y. 10004.

1. Sample sheets if any of each and every letterhead, whether permanently printed or engraved, *etc.*, temporarily stamped or inked, or otherwise impressed or written in any way, and including letterheads of all officers identified in your response to interrogatory 1. of even date, used in the conduct of its written communications by defendant from

*Revised Request for Production of Documents Under
FRCP Rule 34*

January 1, 1968 to the date this request is served upon defendant.

2. Copies of all charters, sub-charters, affreightment contracts, and any other agreements and sub-agreements providing for payment in return for the use of the Texaco Caribbean, or her cargo-carrying capacity, in effect at the time of her loss.

3. Copies of all "documents" relating to the following corporate functions of defendant, as executed during the period December 1, 1970 through January 31, 1971 for the M/V Texaco Caribbean:

- (a) Manning;
- (b) Supplies;
- (c) Accounting;
- (d) Payment Receipt of charter hire;
- (e) Matters pertaining to charterparty terms;
- (f) Port Arrangements;
- (g) Wreck location, marking and removal;
- (h) Salvage; and
- (i) Control or removal of oil.

4. Copies of all "documents" with regard to any communications by or on behalf of defendant with Smit-Tak, Rotterdam, Smit-Tug London, or any other ocean-towing or salvage organization concerning the loss of the Texaco Caribbean; please also include in your production copies of any "documents" prepared by or on behalf of defendant for its internal use of said subject.

*Revised Request for Production of Documents Under
FRCP Rule 34*

5. Copies of all "documents" prepared or contributed to in any way by any survivors of the loss of the Texaco Caribbean.

6. Copies of all "documents" with regard to any communications by or on behalf of defendant with Trinity House, London concerning the loss of the Texaco Caribbean; please include in your production copies of any "documents" prepared by or on behalf of defendant for its internal use on said subject.

7. Copies of all "documents" with regard to abandonment by defendant of the Texaco Caribbean, including but not limited to communications by defendant with any national government, its armed forces, agencies, or other subdivisions thereof, with the hull underwriters and P&I club of the Texaco Caribbean, and with Trinity House, London; please include in our production copies of any "documents" prepared by or on behalf of defendant for its internal use on said subject.

8. Copies of all "documents" identified in your answers to interrogatories Nos. 15 (c), 16, 19, 21, 22, 25, 26.e, and 28.

9. Copies of all "documents" released by or on behalf of defendant to representatives of the media concerning the casualty.

10. Copies of all "documents" showing tables of organization; lines of corporate responsibility; lines of corporate authority; reporting channels; or other corporate organizations:

(a) of defendant;

*Revised Request for Production of Documents Under
FRCP Rule 34*

- (b) between defendant and Texaco Overseas Tankship, Ltd.;
- (c) between defendant and any subsidiary corporations.

11. Copies of all "documents" reporting upon any investigation into any of the circumstances relevant to the collision between the Texaco Caribbean and the Paracas, and/or the collision between the wreck of the Texaco Caribbean and the Brandenburg.

12. Copies of all "documents" in the nature of notes, private memoranda, or other informal records of the investigations described in the above request.

Dated: New York, N.Y.
June 7, 1973.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS

By /s/ MACDONALD DEMING

A Member of the Firm

Attorneys for Plaintiffs Hapag-

Lloyd, Stork Amsterdam, et al.

1 State Street Plaza

New York, N.Y. 10004

To: MESSRS. POLES, TUBLIN, PATESTIDES & STRATAKIS
37 Wall Street
New York, N.Y.

MESSRS. FUCHSBERG & FUCHSBERG
250 Broadway
New York, N.Y.

**Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
June 1973 in Support of Motion for Protective Order
Denying Vessel & Cargo's Discovery**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases
72 Civ. 5009, 5010, 73 Civ. 92, 93, 94, 95,
96, 97, 98, 99, 117, 166 and 182)

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MELVIN J. TUBLIN, being duly sworn, deposes and says:

1. I am a member of the firm of Poles, Tublin, Pates-
tides & Stratakis, attorneys for the defendant, Texaco
Panama Inc. and am familiar with all the pleadings and
and proceedings heretofore had in this matter.

2. This affidavit is submitted in reply to "Plaintiffs'
Affidavit Concerning Discovery . . ." and in support of
defendant's motion to dismiss.

3. These consolidated actions arise out of the collision
on January 11, 1971 in the English Channel between the
Peruvian vessel, Paracas and the Panamanian vessel,
Texaco Caribbean, and the subsequent allision on January
12, 1971 between the German vessel, Brandenburg and
wreck of the Panamanian vessel, Texaco Caribbean, as it
lay on the bottom of the English Channel, Straits of Dover,
within 12 miles of the English Coast.

4. On March 2, 1973, the defendants herein by their
attorneys moved this court for an Order pursuant to Rules

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
June 1973 in Support of Motion for Protective Order
Denying Vessel & Cargo's Discovery*

12 and 56, Federal Rules of Civil Procedure, dismissing, insofar as these plaintiffs are concerned, these two actions, solely on the grounds of *forum non conveniens*.

5. Plaintiffs, after obtaining several extensions of time within which to submit answering papers to defendants' motion, now maintain that they require certain discovery in order to oppose defendants' motion to dismiss. More specifically, plaintiffs' counsel states at page 2 of his "Affidavit Concerning Discovery . . ." as follows:

"Plaintiffs' discovery is needed to learn the geographical location of vital evidence and witnesses." [Emphasis supplied.]

In addition, plaintiffs' counsel states several times in his Affidavit that the requested discovery is needed in order to locate United States witnesses of Texpan.

6. This information, however, has already been supplied to plaintiffs' counsel in the affidavits of Mr. Robert R. Dimock (President of Texaco Panama Inc.) and Mr. E. F. Pointon (Managing Director of Texaco Overseas Tankship Limited) which affidavits are annexed to and part of defendants' motion to dismiss.

7. (a) In particular, Mr. Dimock stated as follows:

"6. The master, officers and crew who were aboard the Texaco Caribbean at the time of the initial casualty, were Italian nationals and were not citizens or residents of the United States.

"7. In view of the fact that the subject casualties occurred in the English Channel, TOT is thor-

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
June 1973 in Support of Motion for Protective Order
Denying Vessel & Cargo's Discovery*

oughly familiar with the facts and circumstances surrounding the casualties including the steps taken by the British Corporation of Trinity House to locate and mark the wreck of the Texaco Caribbean and to warn other vessels of the presence of the wreck. Furthermore, all *material records, documents and witnesses concerning the subject casualties are located in England.* [Emphasis supplied]

* * * * *

"9. There are no witnesses on behalf of Texpan who are citizens or residents of the United States." All of Texpan's witnesses, i.e., employees of TOT, surviving crewmembers of the Texaco Caribbean, employees of Trinity House, crewmembers of the British fishing vessels, Accord and Viking Warrior, amongst others, reside in England . . . or will be produced in England in connection with the suits and claims presently pending there . . ."

(b) Furthermore, Mr. Pointon stated as follows:

"3. . . . TOT, at all times mentioned in the Complaints herein, managed and operated the Texaco Caribbean on behalf of its owner, Texaco Panama Inc. . . ."

* * * * *

6. . . . In addition, records to Texpan concerning the Texaco Caribbean and in particular, the subject casualties are kept in England where our main office is and where law suits and claims arising out of the subject casualties are presently being prosecuted and defended.

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
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"8. All of the witnesses necessary for a proper defense by Texpan, i.e., surviving crewmembers of Texaco Caribbean, employees of TOT, employees of Trinity House, crewmembers of the British fishing vessels, Accord and Viking Warrior, amongst others, reside in England or would be available in England in connection with the litigation and claims presently pending in England. *None of these witnesses are citizens or residents of the United States.* Furthermore, none of the various plaintiffs' witnesses are citizens or residents of the United States." [Emphasis supplied.]

8. It is submitted, therefore, that plaintiffs are not really interested in obtaining the geographical location of the various witnesses and documents involved but are attempting to use this Court as a tool to circumvent the motion to dismiss the complaint by obtaining a broad discovery and then be in a position after discovery to allege that it is no longer inconvenient to try this motion in this forum. The discovery sought is directly concerned with the merits of the litigation and has nothing whatsoever to do with the issue of *forum non conveniens*.

9. Plaintiffs' counsel in support of his request for discovery has also stated in paragraph 5 of his affidavit that "it is necessary first to identify the central merits issues. . . .". However, in paragraph 3 of his affidavit he states "The suits are based upon the failure of the defendants to locate, mark or buoy the wreckage of the Texaco Caribbean as required by law."

10. Based on the identification of the "central merits issues" by plaintiffs' counsel as shown above and in view

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
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of the fact that all matters relating to the location, marking or buoyage of the wreck (central merits issues) were carried out in England by the British Corporation of Trinity House and *solely* within the knowledge of English witnesses, it is obvious that all witnesses and documents bearing on the above are located in England, where all events transpired. Messrs. Dimock and Pointon have already stated that there are *no* United States witnesses and records involved in the matter.

11. A thorough analysis of the underlying facts in this matter and thorough review of the affidavits of Messrs. Harris, Pointon and Dimock submitted in support of defendants' motion to dismiss clearly indicates that *anyone* who could possibly be called as a witness by any party to this litigation either presently resides in England or will be available in England in connection with the litigation pending there and that *not one witness* on behalf of either plaintiffs or defendants is a citizen or resident of the United States.

12. Not only is it clear from the affidavits of Messrs. Harris, Pointon and Dimock that all of the defendant's documentary evidence and witness are located in England but it is also clear from the pleadings and surrounding facts herein that all of the plaintiffs' own evidence and witnesses would have to come from sources outside the United States.

13. Plaintiffs' counsel has intimated in his affidavit that "plaintiffs have received clear indications that the seat of final corporate authority of Texpan is in New York . . ." but has not to date come forward with any

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
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evidence indicating the substance of such intimations. On the other hand, defendants have stated in sworn affidavits that the operation and management of the Texaco Caribbean was in the hands of TOT, a British corporation. See Pointon's affidavit paragraph 3 and Dimock's affidavit paragraph 5.

14. It is submitted, therefore, that defendants have already supplied plaintiffs with all the information they would require in order to prepare answering papers on the motion to dismiss. Plaintiffs have continually ignored the fact that they have already been supplied with the requested information, i.e., "the geographical location of vital evidence and witnesses" and continue to press for information clearly directed to the merits of this litigation.

15. It is obvious, therefore, that plaintiffs are merely fishing in shallow waters to circumvent the motion to dismiss trying to harass the defendant and are using this Court as a means of getting information for use in the Courts of England in connection with the litigation there.

16. While plaintiffs have reduced the number of interrogatories from 92 to 29, and the number of requests from 17 to 12, they have now added the request for extensive oral depositions. It is apparent that plaintiffs are still attempting to confuse the merits and the issue of *in personam* jurisdiction (which is not an issue here) with the issue of *forum non conveniens*, which is the sole issue now pending before this Court. For specific objections to each interrogatory and request for production, the Court is respectfully referred to Defendant's Objections to Plaintiffs Revised Interrogatories (Exhibit "A" hereto) and

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
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Defendant's Objections to Plaintiffs Revised Request for Production (Exhibit "B" hereto).

17. In connection with the comments made by plaintiffs' counsel in paragraph 8 of his affidavit, it should be noted that in answer No. 31 of defendants' objections to interrogatories (Exhibit "D" to defendants' motion for a protective order) it was clearly stated that defendant had no New York office. Furthermore, it is clear from all the above that there are *no* United States witnesses of Texpan; that all steps concerned with locating, marking and buoying the wreck of the Texaco Caribbean were taken in England and that all the crewmembers of the Texaco Caribbean were foreign nationals and were not citizens or residents of the United States.

18. More importantly, it should be noted that no where in any of its papers has plaintiff ever shown that even if it were granted the requested discovery, it would lead to facts that would result in a decision of other than dismissal of these actions. Nor can it do so.

19. Even if the defendant maintained an office in New York, which it does not, such fact would not be controlling on the issue of *forum non conveniens*. See the case of *Domingo v. States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y., 1972)* where this court dismissed the action on the grounds of *forum non conveniens* despite the fact that the defendant therein was a New York corporation with its principal place of business located in New York.

20. Particularly this is so (1) when jurisdiction over

* Previously cited in defendant's memorandum of law.

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other indispensable parties cannot be obtained in the United States but can be obtained in England; (2) when all the circumstances and events which are the subject of the litigation occurred outside of the United States; and (3) when it is obvious that all witnesses and documentary evidence are located outside of the United States.

21. In summary, it is clear from all the papers now before the Court that

(a) Plaintiffs have already been supplied with all the information to which they are entitled, i.e., the geographical location of witnesses and documents.

(b) The remaining information requested by plaintiffs is abroad and pertains to the merits of the litigation and issues not now pending before this Court.

(c) Even were plaintiffs granted the requested discovery at this juncture of the litigation, such discovery would not lead to any facts which could affect this Court's decision on defendant's motion to dismiss. Particularly this is so when all the factors bearing on the issue of *forum non conveniens* are weighed together.

(d) Plaintiffs are harassing the defendants and are attempting to embroil this Court in issues not now pending before it.

(e) Plaintiffs are wasting the time of this already overburdened Court and are attempting to delay a decision on defendant's motion to dismiss with the hope that they will be able to bootstrap themselves into this Court.

WHEREFORE, it is respectfully requested that plain-

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
June 1973 in Support of Motion for Protective Order
Denying Vessel & Cargo's Discovery*

tiffs' request for discovery be denied and that all discovery be stayed pending a determination of defendant's motion to dismiss and further that plaintiffs be directed to submit answering papers to defendant's motion to dismiss within such time as the Court deems reasonable.

/s/ MELVIN J. TUBLIN

(Sworn to by Melvin J. Tublin on June 14, 1973.)

DEFENDANT'S OBJECTIONS TO PLAINTIFFS' REVISED
INTERROGATORIES.

Item 1. Interrogatory No. 1 is not relevant to the issues before the Court, i.e., *forum non conveniens*. The question is directed at the internal corporate management and has, insofar as the issues now pending before the Court are concerned, already been answered in the Affidavits of Messrs. Dimock and Pointon. Further, plaintiffs' attorney states in Paragraph 8 of his Affidavit that answers are required in order "to locate the vital United States witnesses of Texpan". However, plaintiffs have already been advised that there are *no* United States witnesses of Texpan, vital or otherwise.

Item 2. See Objection No. 1 above.

Item 3. See Objection No. 1 above.

Item 4. See Objection No. 1 above.

Item 5. See Objection No. 1 above.

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
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Item 6. Plaintiffs' attorney states in Paragraph 8 of his Affidavit that this information is required in order to ascertain "the authority of Texpan's New York office concerning such matters as locating and marking the wreck of the Texaco Caribbean". Plaintiffs' attorneys have already been advised that Texpan did not and does not now maintain an office in New York.

The interrogatory request information which is not relevant to the issue of *forum non conveniens* and for the most part is concerned solely with internal corporate functions going to the merits of the litigation but certainly not to the only relevant issue now pending before this Court.

Item 7. Not only is the requested information not relevant to the issue of *forum non conveniens*, plaintiffs' attorneys were advised of the fact that at the time of her loss, the Texaco Caribbean was proceeding in ballast. (See Pointon's Affidavit, Paragraph 5).

Item 8. Plaintiffs' attorneys are well aware that all steps taken in connection with locating, marking or removing the wreck of the Texaco Caribbean were taken in England. Furthermore, the requested information is concerned with the merits of the litigation and not the issue of *forum non conveniens*. More importantly, however, plaintiffs' attorneys have been advised that there are no United States witnesses of Texpan. (See Affidavit of Pointon, Paragraph 8—Affidavit of Dimock, Paragraph 9).

Item 9. See Comment No. 8 above.

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Answer 10. <i>Residence</i>	<i>Business</i>
Edificio Cerro	Via Transismica
Bonito, Calle 1A	
Panama, R.P.	
Parque Tefevre	Panama, R.P.

Item 11. Information requested is totally irrelevant on the issue of *forum non conveniens* and would require defendant to obtain detailed information from Panama, where it maintains its only office.

Item 12. See Comment No. 11 above.

Item 13. See Comment No. 11 above.

Answer 14. No one from New York working on behalf of Texpan went to England at the time of the casualties.

Item 15. Concerned solely with the merits of the litigation. Mr. Pointon stated further, however, in Paragraph 8 of his sworn Affidavit, that all of the witnesses reside in England or would be available there and that none of the witnesses are citizens or residents of the United States. Requested detailed information is, therefore, not only irrelevant but unnecessary at this stage of the litigation.

Item 16. Plaintiffs have already been advised that defendant does not maintain a New York office. Furthermore, the question as to who may have been notified of the collision, if anyone, and when they may have been notified is irrelevant to the issue of *forum non conveniens*.

Answer 17. Defendant only maintains an office in

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
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Panama. However, TOT, in London, as manager and operator of the Texaco Caribbean, was authorized to employ expert assistance to locate, mark or salvage the wreck of the Texaco Caribbean.

Answer 18. See Answer No. 17 above.

Item 19. All such communications, if any exist, would have emanated from England and would be presently located there. Furthermore, the information sought concerns the merits of the litigation and is not relevant to the issue of *forum non conveniens*. See Objection No. 8 of defendant's Objections to plaintiffs' Revised Request for Production, etc.

Item 20. Plaintiffs have already been advised that the crewmembers of the Texaco Caribbean were Italian nationals and that none were citizens or residents of the United States. Whether or not any particular crewmember was on watch or not at the time of the Paracas collision is concerned only with the merits of the litigation and is not relevant on the issue of *forum non conveniens*.

Item 21. Information sought goes to the merits of this litigation. In addition it would require obtaining information from documents located outside of this jurisdiction.

Item 22. The information requested is concerned *solely* with the merits of the litigation and is not relevant to the issue of *forum non conveniens*. Plaintiffs have already been advised that there are no United States witnesses involved in this matter and that all matters concerned with locating, marking, etc. occurred in England and all documents therewith are located in England.

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Item 23. See Objection No. 22 above.

Item 24. See Objection No. 22 above.

Item 25. This interrogatory is too broad and goes beyond the scope of the "central merits issues" as defined by plaintiffs' attorneys. In any event, the information sought is concerned *solely* with the merits of the litigation and is not relevant to the issue of *forum non conveniens*.

Item 26. The question of whether or not the wreck of the Texaco Caribbean has ever been abandoned has no relevance whatsoever on the issue of *forum non conveniens* and is evidence of plaintiffs' fishing expedition to obtain broad, unlimited discovery for use in the English Courts.

Item 27. Whether or not, and if so, how many, vessels owned or chartered by Texpan may have touched the Port of New York is totally irrelevant to the issue of *forum non conveniens*. This information would only be relevant if the Court were deciding a jurisdictional issue, which it is not. This interrogatory has no bearing on the issue of whether or not it would be more convenient to litigate this matter in England.

Item 28. The listings, if any, in any of the named publications is totally irrelevant to the issue of *forum non conveniens* and to the "central merits issues". Plaintiffs are requesting defendant to search public records which are equally available to plaintiffs and their attorneys. In any event ownership is not in issue in this Motion.

Answer 29. Plaintiffs are referred to Paragraphs 7 and 9 of Mr. Dimock's Affidavit and Paragraph 8 of Mr. Pointon's Affidavit.

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
June 1973 in Support of Motion for Protective Order
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DEFENDANT'S OBJECTIONS TO PLAINTIFFS' REVISED
REQUEST FOR PRODUCTION OF DOCUMENTS.

Item 1. Documents requested are completely irrelevant to the issue of *forum non conveniens*, which is the only issue presently before this Court. While letterheads may be an indication of defendant's places of business, this would only be relevant to a jurisdiction issue (an issue which is of no concern to this Court). Furthermore, defendant in its Objections to interrogatories dated May 9, 1973 has already advised plaintiffs in Item No. 31 thereof that it does not have a New York office. In addition, such information could not possibly bear on the issue identified by plaintiffs as the "central merits issue", i.e., failure of defendant to locate, mark or buoy the wreckage of the Texaco Caribbean in the English Channel.

Item 2. Such documents, if any exist, are concerned solely with the merits of these actions and are not relevant to the issue of *forum non conveniens*. In fact, plaintiffs' attorneys were advised of the fact that at all material times, the Texaco Caribbean was proceeding in ballast. (See Pointon's Affidavit, Paragraph 5). Further, the vessel's cargo capacity of earning capacity are immaterial and irrelevant.

Item 3. These documents pertain to internal Corporate functions going to the merits of the litigation and the issue of *in personam* jurisdiction, neither of which is before the Court. In addition, defendant has already stated by sworn Affidavit, that all documentary evidence, including those relating to corporate function, are located outside this jurisdiction. Furthermore, the information requested again

*Texaco Defendants' Counsel Mr. Tublin's Affidavit of 14
June 1973 in Support of Motion for Protective Order
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goes beyond the *forum non conveniens* aspects of what plaintiffs' attorney has identified as the "central merits issue". With regard to subsection (g) in particular, plaintiffs' attorney has already been told that these documents are located in England and could not be transported here without great expense, hardship and inconvenience.

Item 4. The requested documents clearly pertain to the merits of this litigation and involves documents which plaintiffs know are located outside of the United States. Any such communications, if in existence, would have emanated from England and would be presently located there.

Item 5. These documents again are clearly not related to the issue of *forum non conveniens* but are concerned directly with the merits of this litigation. Furthermore, plaintiffs know that the surviving crewmembers of the Texaco Caribbean were all foreign nationals, residing outside of the United States, and that, therefore, if any such "documents" exist, they would be located outside of the United States. With regard to ship's logs and records in particular, these are located in England. More importantly, any crew statements made concerning the loss of the Texaco Caribbean would be privileged information, obtained after retention of English counsel and in preparation for litigation. Furthermore, the request is too broad and vague and would not be allowable.

Item 6. Clearly this request again pertains solely to the merits of this litigation and involves documents which plaintiffs obviously know are located outside of the United States in England.

*Vessel & Cargo's Counsel Mr. Deming's Reply Affidavit
of 29 June 1973 in Support of Plaintiffs' Application
for Discovery*

Item 7. See Objection No. 6 above.

Item 8. See Objection No. 6 above.

Item 9. See Objection No. 6 above.

Item 10. See Objection No. 3 above.

Item 11. See Objection No. 6 above. In addition, plaintiffs know that this matter was investigated in England by defendant's attorneys and that therefore, the requested information and documents are privileged. The requested documents have nothing to do with plaintiffs' definition of central merits issues or *forum non conveniens*.

Item 12. See Objection No. 11 above.

**Vessel & Cargo's Counsel Mr. Deming's Reply Affidavit
of 29 June 1973 in Support of Plaintiffs' Application
for Discovery**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008, and consolidated cases 72 Civ. 5009,
5010, 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117,
166 and 182 CMM

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MACDONALD DEMING, being duly sworn, hereby deposes and says:

*Vessel & Cargo's Counsel Mr. Deming's Reply Affidavit
of 29 June 1973 in Support of Plaintiffs' Application for
Discovery*

1. I am a member of the firm of Haight, Gardner, Poor & Havens, attorneys for plaintiffs Hapag-Lloyd A.G. and Stork Amsterdam, N.V., et al., and am familiar with all the pleadings and proceedings heretofore had in this matter.

2. This affidavit is submitted in reply to Mr. Tublin's affidavit of June 14, 1973 opposing plaintiffs' application for discovery.

3. Counsel for Texaco have artfully prepared the affidavits submitted on their clients' behalf so as to allege generally that all material records, documents and witnesses are located in England. Nothing is said, however, as to the seat of defendants' corporate authority—the place where final decisions regarding the locating, marking and salvage of the wreck of the Texaco Caribbean were made. Your deponent's present information, though very limited, nevertheless powerfully indicates that this place was Texpan's New York office.

4. Your deponent is informed and believes that defendant Texaco Panama, Inc.'s New York office, on or about December 1967 or January 1968, advised selected companies and persons in the shipping industry of certain corporate arrangements involving Texpan and TOT. Your deponent understands this advice included, in substance, at least the following notices:

—that TOT, as and from a particular date, would handle the routine operational business of Texpan vessels;

—but that Texpan New York would continue handling the more important matters of charter hire payment, and consideration of the drafting and contents of charterparties; and

*Vessel & Cargo's Counsel Mr. Deming's Reply Affidavit
of 29 June 1973 in Support of Plaintiffs' Application for
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—that Texpan New York would even continue to receive certain routine reports on the use of Texpan vessels.

Plaintiffs' revised interrogatories numbers 5-7, and revised request for production number 3 cover this advice.

5. Your deponent is informed and believes that the services of the Smit salvage vessel Orca were offered by Smit to one Mr. Loker, a London Texaco representative, at 10:30 a.m., January 11, 1971*, and that discussions were also held on January 11, 1971 between one Captain Watson, a London Texaco representative, and Smit in which Smit's salvage vessel Bever was also offered to Texaco, on a daily hire basis.

Your deponent is further informed and believes that Texaco's Mr. Loker and Captain Watson both advised Smit that they *would have to contact New York for authority to charter Smit vessels*, and would be doing so, though ultimately the Smit vessels were not hired.

6. On the basis of this information, plaintiffs believe that final decisions concerning some of Texpan's routine corporate affairs, and concerning all of its important corporate affairs—including decisions regarding locating, marking and salvage of the wreck of the *Texaco Caribbean*—were made in its New York office. Accordingly—Texpan's witnesses as to corporate decisions on these points, together with relevant documentary evidence, should be found in New York. Since this would establish New York

* The *Texaco Caribbean* and *Paracas* collided at 4:10 a.m., January 11, 1971; the *Brandenburg* struck the unlocated and unmarked wreck of the *Texaco Caribbean* on 0734, January 12, 1971.

*Vessel & Cargo's Counsel Mr. Deming's Reply Affidavit
of 29 June 1973 in Support of Plaintiffs' Application for
Discovery*

as the only appropriate forum for litigation of plaintiffs' claims against Texpan/Texaco for damages resulting from failure to locate and mark the wreck, plaintiffs submit that they are entitled to the information requested on these points from defendants, so that all the facts regarding witness and evidence location can be placed on the table prior to the hearing of defendants' *forum non conveniens* motion.

7. As to other witnesses most conveniently available in the United States, the Leslie Lykes (an American flag vessel, home port Jacksonville) sighted the slowly sinking stern section of the Texaco Caribbean on January 11, 1971 and stood by it for several hours thereafter. Her officers and crew will be most readily available in the United States to give testimony, which plaintiffs believe will be to the effect that the wreck was unmarked, though buoys or other markers could readily have been attached so as to have marked its position when it sank, had Texpan fulfilled its duty to do so.

8. Plaintiffs are additionally informed and believe that the first Texaco representative to arrive at Dover or Folkstone to do anything about the casualty arrived January 15, 1971 (four days after the casualty), and came from Monaco rather than London. Plaintiffs suggest this indicates that TOT's involvement in the casualty was primarily as a conduit; the important on-scene investigation, as well as the ultimate decisions *re* location, marking and salvage, appear to have been handled by others, located outside England.

9. Defendants' strenuous resistance to plaintiffs' greatly reduced requests for information as to the location of pertinent documents and information should not succeed.

*Vessel & Cargo's Counsel Mr. Deming's Reply Affidavit
of 29 June 1973 in Support of Plaintiffs' Application for
Discovery*

Plaintiffs are proceeding against defendants on the basis of defendants' failure to locate and mark the wreck of the Texaco Caribbean. Plaintiffs' present information powerfully indicates that defendants' representatives in New York controlled decisions on these matters; if so, the most important Texaco witnesses and information in the case are in New York. The only way all the facts on this point, which is central to the pending *forum non conveniens* motion, can be placed before this Honorable Court is to require their production by defendants, who control them.

10. Plaintiffs respectfully submit that this Honorable Court should hand down its order requiring defendant Texaco Panama, Inc. to respond to plaintiffs Hapag-Lloyd and Stork Amsterdam, *et al.*'s revised interrogatories and requests for production, and deferring hearing of the pending *forum non conveniens* motion until appropriate depositions, as indicated by defendants' responses, have been taken by plaintiffs.

Respectfully submitted,

/s/ MACDONALD DEMING

To: MESSRS. FUCHSBERG & FUCHSBERG
250 Broadway
New York, N.Y.

MESSRS. POLES, TUBLIN, PATESTIDES
& STRATAKIS
37 Wall Street
New York, N.Y. 10005

(Sworn to by MacDonald Deming on June 29, 1973.)

**Death Claimants' Counsel Mr. Goldstein's Affidavit of
29 Jun 1973 in Support of Plaintiffs' Application for
Discovery**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HARVEY GOLDSTEIN, being duly sworn, deposes and says:

I am the attorney for the Public Administrator of the County of New York, Administrator of the Estates of twelve deceased seamen employed aboard the *Brandenburg*, which was in collision with the sunken hull of the *Texaco Caribbean* on January 12, 1971, approximately one day after the *Texaco Caribbean* was in collision with another vessel.

I am familiar with all the pleadings and proceedings heretofore had herein and submit this affidavit in support of plaintiffs' application for an Order granting them discovery by interrogatories, production of documents and depositions before the argument of defendants' motion to dismiss on the grounds of *forum non conveniens*.

I have read the affidavit of MacDonald Deming and of Melvin J. Tublin and wish to bring to the Court's attention the relationship between *Texaco Panama* and *Texaco* in that the operation of a world-wide oil and shipping combine is involved in this motion for dismissal.

Assuming that *Texaco Panama* has its original corporate offices in Panama in order to save on taxes and on

*Death Claimants' Counsel Mr. Goldstein's Affidavit of 29
Jun 1973 in Support of Plaintiffs' Application for
Discovery*

shipping costs (seamen's wages, etc.), that in and of itself does not proscribe the advancing of proof that the corporation is, in fact, governed, controlled and channeled by its operating group in New York City, the management of Texaco by reason of stock ownership of Texaco Panama. Nor does it permit the inference that the Panamanian offices are anything more than a minimal showcase to establish its nominal entity as a Panamanian corporation. By saying this, I do not in any way impugn Texaco Panama, nor are any aspersions cast since it is all perfectly legal and proper. But proper business procedure has very little to do with the issues involved in this motion. What is of prime concern is the location of the control of Texaco Panama business and vessels. In short—where is the throne upon which the King sits?

Deponent fully believes that it is New York City—and that the people in and about New York City are the management of Texaco Panama or those in Texaco who control the management of Texaco Panama.

There is ample law for finding that Texaco Panama, for the purpose of this suit, is under the domination and control of Texaco, an American corporation with its control center of activity in its enormous offices at 135 E. 42nd Street, the Chrysler Building, New York City, where Texaco Panama also has its offices and where both defendants were served by the United States Marshal upon commencement of this suit. As such, if this Court does determine that degree of control of Texaco Panama by Texaco, then the defendants are faced with the insurmountable task of explaining away the presence of Texaco in New York City as its center of activity and place of business control.

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Jun 1973 in Support of Plaintiffs' Application for
Discovery*

However, the plaintiffs are not dependent upon proving that, but only advance it to show the roads that will be taken to establish to the Court's satisfaction that New York City was and is the proper, and perhaps the only practicably possible, forum for this suit.

The offices of Texaco Panama being in New York City; as an integrated part of the offices of Texaco in New York, that factor only, without any further proof, should establish New York and this Court as being the locale of the seat of ultimate control and authority of the defendants.

Of course, as stated above, if there is shown the requisite degree of control of Texaco Panama by Texaco, then can there be any doubt but that we are properly before this Court.

I have been informed that the suits brought in England were done so for the purposes of stopping any statute of limitations and have not been actively prosecuted or defended by any of the parties. In fact, service has not even been made on some of the defendants. All of this is well known to the defendants herein and has been inserted into this motion as a strawman issue. In point of fact, the sole actively prosecuted suit is before this Court, others in England, in Delaware and a suit *in rem* against other vessels of Texaco Panama in New York have been started only to arrest the passage of time.

Certainly the fact that there are records in England in no manner makes them unavailable herein. Further, I have been informed that American ships were involved in the rescue operation of the Brandenburg crew and that

*Death Claimants' Counsel Mr. Goldstein's Affidavit of 29
Jun 1973 in Support of Plaintiffs' Application for
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their officers and crew are witnesses to the location of and lack of markings of the Texaco Caribbean.

The defendants place great store on the nationality of the Texaco Caribbean crew, which sank approximately one day before and which was totally absent any crew members, whether Italian or otherwise, at the time of the collision with the Brandenburg—the subject of this suit. Again the placing of strawmen by the defendants in this matter only to mislead this Court into believing that the fact pattern herein involves non-Americans, who were away from and cannot possibly add to the store of information pertaining to location and buoy markings of the Texaco Caribbean one day later.

Information has been received that efforts to take steps to properly mark the sunken hull of the Texaco Caribbean were asked for and were delayed by the New York Office of Texaco and Texaco Panama (which one or both of the two corporations were the same officials working for at that time is surely a question of fact for determination by the triers of fact).

The defendants seek to avoid the plaintiffs' rights to discover which forum is convenient in defense against this motion. Answers to that question are of prime importance and cannot be shown by unsubstantiated self-serving affidavits by the defendants' officials. Let the truth come out, give the plaintiffs' attorneys reasonable leeway to prove to this Court's satisfaction that this suit is not only properly in this forum but that no other forum is even remotely connected with the facts of this suit against the defendants

*Death Claimants' Counsel Mr. Goldstein's Affidavit of 29
Jun 1973 in Support of Plaintiffs' Application for
Discovery*

for that period of time following the sinking of the Texaco Caribbean up to and following the collision of its hull with the Brandenburg.

With American officers of other vessels as witnesses; with the officers of both Texaco and Texaco Panama in New York City as witnesses; with Texaco Panama owned and controlled by Texaco from New York, I respectfully submit that this motion to dismiss should and will be denied and ask only that the opportunity to defend the commencement of suit in New York City be granted by way of reasonable discovery.

WHEREFORE, I respectfully join with plaintiffs Hapag-Lloyd AG and Stork Amsterdam N.V. in asking this Honorable Court for permission to discover such facts by way of interrogatories, production of documents and depositions to establish to the Court's satisfaction the propriety and convenience of this forum.

/s/ HARVEY GOLDSTEIN

(Sworn to by Harvey Goldstein this 29th day of June, 1973.)

**Magistrate Jacobs' Report of 25 Jul 1973 Recommending
Limitation of Plaintiffs' Discovery**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

72 Civ. 5008 CMM and consolidated cases 5009, 5010,
73 Civ. 92-99, 117, 166 and 182 (Judge Metzner)
73 Civ. 92-99, 117, 166 and 182
(Judge Metzner)

[SAME TITLE]

On January 12, 1971 there was a collision in the English channel of the German vessel Brandenburg with the wreckage of the Texaco Caribbean. This followed a collision on January 11, 1971 between the Peruvian vessel Paracas and the Texaco Caribbean.

The present consolidated suits in this Court were brought to recover damages resulting to the families of twelve deceased crew members of the Brandenburg, and for damages resulting from loss of the Brandenburg and her cargo. Plaintiffs state that "the suits are based upon the failure of the defendants to locate, mark or buoy the wreckage of the Texaco Caribbean as required by law" (Aff. Deming June 7, 1973, par. 3). There are pending three motions being (1) a motion by defendants to dismiss the actions on the grounds of *forum non conveniens*, (2) a motion by plaintiffs for an order permitting discovery requested in order to oppose defendant's motion and (3) a motion by defendants for a protective order with respect to the discovery. The motions were referred to the undersigned and hearings were held on the discovery motions on May 22 and June 29, 1973. This report deals only with the discovery motions.

*Magistrate Jacobs' Report of 25 Jul 1973 Recommending
Limitation of Plaintiffs' Discovery*

I.

In support of their motion for dismissal defendants have offered the affidavit of Robert R. Dimock, sworn to February 6, 1973, (president of Texaco Panama, referred to as Texpan) and the affidavit of E.F. Pointon, sworn to February 5, 1973 (Management Director of Texaco Overseas Tank Ship Ltd., referred to as TOT). These affidavits, briefly stated, set forth the following: Texpan was the sole owner of the Texaco Caribbean, registered under the laws of Panama. It suffered a total loss on January 11, 1971 as a result of its collision with the Paracas. On January 12, 1971 the Brandenburg collided with the hull of the Texaco Caribbean. The vessel was managed and operated by TOT, incorporated under the laws of Great Britain with offices at London, England. The master, officers and crew of the Texaco Caribbean were Italian nationals. The British corporation of Trinity House was engaged by TOT to locate and mark the wreck of the Texaco Caribbean and to warn other vessels of the presence of the wreck. TOT is familiar with the steps taken by Trinity House. There are no witnesses on behalf of Texpan who reside in the United States and all of its witnesses (employees of TOT, surviving crew members of the Texaco Caribbean, employees of Trinity House, crew members of British fishing vessel Accord and Viking Warrior) reside in England and are subject to compulsory process there. TOT, in the business of shipping management and operation, manage the Texaco Caribbean and other vessels in the Texpan fleet. It equips and maintains the vessels, appoints agents of the ports, and settles all claims. After the collision the Texaco Caribbean broke in two, the forward section sinking immediately while

*Magistrate Jacobs' Report of 25 Jul 1973 Recommending
Limitation of Plaintiffs' Discovery*

the stern sank later. Prior to the sinking of the Brandenburg, crew members aboard the British fishing vessels (Accord and Viking Warrior) observed the approach of the Brandenburg and after the sinking picked up survivors and the bodies of deceased seamen from the Brandenburg. According to the affidavit of Pointon, Trinity House, advised of the casualty, dispatched its vessel Siren to the scene and she displayed a warning signal but apparently this signal was not properly interpreted by the Brandenburg and it thereafter collided and sank (p. 4).

Defendants state that the following legal actions are pending in England: (1) an action by the cargo owners of the Brandenburg against the Paracas, Texaco Caribbean, and Trinity House but plaintiffs state this action was "protective" and is not active; (2) an action by the Texaco Caribbean against the Paracas; (3) an action by the Paracas against Texaco Caribbean and (4) an action by the Brandenburg against Trinity House.

Thus, defendants urge that all of the witnesses and documents are located outside of the United States and are not subject to compulsory process in this Court. Defendants stress that there is no question as to (1) where the collision occurred; (2) the absence of certain indispensable parties before this Court, apparently being Trinity House and the owner of the Paracas who are subject to cross claims by defendants; (3) Trinity House, engaged to locate and mark the wreck, is located in England together with its personnel and records; and (4) the crews of all three vessels involved are foreign nationals none of whom reside in the United States. Defendants rely particularly on the decisions in *Fitzgerald v. Westland Marine Corp.*,

*Magistrate Jacobs' Report of 25 Jul 1973 Recommending
Limitation of Plaintiffs' Discovery*

369 F2d 499, 501 (2 Cir. 1966); and *Domingo v. States Marine Lines*, 340 F. Supp 811 (S.D.N.Y. 1972 Judge Bryan).

Plaintiffs urge that the "seat of authority" for defendants was in New York. They also urge that the Leslie Lykes (an American flag vessel, home port Jacksonville) sighted the slowly sinking Texas Caribbean on January 11, 1971 and stood by it for several hours; and that her crew will be available in the United States to testify which plaintiffs believe will be that the wreck was unmarked, though buoys or other markers could readily have been attached had Texpan fulfilled its duty to do so.

II.

Plaintiffs state that "Discovery is needed to learn the geographical location of vital evidence and witnesses. To identify these it is necessary to first identify the central merits issues and then ask who has knowledge of them and where they live and work and where relevant documents on these issues are" (Aff. Deming June 7, 1973, par. 5).

Defendants object to any discovery on the ground that they merely go to the merits of the action and are irrelevant to the issues on *forum non conveniens*. Plaintiff originally served 92 interrogatories which were reduced to 29 and 17 document requests which were reduced to 10. While defendants have objected to most of the requested discovery they in effect in the course of the objections have answered some of them.

Many of the interrogatories clearly go to the merits and appear to be irrelevant to the questions presented on

*Magistrate Jacobs' Report of 25 Jul 1973 Recommending
Limitation of Plaintiffs' Discovery*

forum non conveniens. Typical of such items are interrogatory 15 which seeks copies or the substance of all reports made by employees of TOT; 22 which seeks the substance of all requests made by Texpan to locate or mark the wreck; document request 5 which seeks copies of all documents prepared or contributed by any survivors of the Texaco Caribbean; and 11 which seeks copies of all documents reporting upon any investigation "into any of the circumstances relevant to the collisions". However, in view of the importance of the actions and the position of plaintiffs as to the "situs" of the likely evidence plaintiffs should now be afforded liberal discovery, but not broad discovery on the merits, as to the location of any witnesses who took part or made any decisions as to locating or marking or buoying the wreckage. With this guideline plaintiffs should be allowed the following discovery as to the interrogatories:

As to 1, each office of Texpan, the representative in charge, and the functions there performed.

3, as to the authority of Texpan to do business in New York, should be answered.

5, as to responsibilities of officers of Texpan and their functions, should be answered as to "g" (wreck location), "h" (wreck removal), and "i" (salvage of Texpan vessels).

6, as to who in the offices had to decide such matters, should be answered as to "c" (whether wreck removal was to be undertaken) and "e" (steps to be taken to locate a wreck).

8 should be answered to the extent of furnishing the name of any person residing in the United States, now or at the time of the collision, who had any discussion or com-

*Magistrate Jacobs' Report of 25 Jul 1973 Recommending
Limitation of Plaintiffs' Discovery*

munication or participation in decisions as to locating, marking or removing the wreck. As revised by the undersigned this interrogatory should enable plaintiffs to identify and ascertain the location of witnesses.

As to 21 (the ship management agreement between Texpan and TOT) defendants should produce any portions thereof relating to whether there is authority in any representative residing in the United States to employ anyone to locate or mark a wreck.

Except as to the above no further answers need be given. It is believed that the answers to the interrogatories as revised will enable plaintiffs to explore fully the nature and location of witnesses and evidence.

III.

Assuming the accuracy of the answers to the interrogatories there would be no reason for the production of any documents. However, plaintiffs assert that they desire to probe the answers to the interrogatories.

They refer to request 4, seeking documents with regard to any communications on behalf of defendant and Smit-Tak, Rotterdam, and Smit-Tug London. They state their belief that these parties offered salvage vessels to London representatives of Texaco but were advised that "they would have to contact New York for authority to charter Smit vessels—though ultimately the Smit vessels were not hired" (Aff. Deming June 29, 1973, P. 3). Accordingly, defendants should produce all documents between Texaco, Texpan, and TOT, on the one hand, and Smit-Tak and Smit-Tug on the other hand, for the period of five days

*Magistrate Jacobs' Report of 25 Jul 1973 Recommending
Limitation of Plaintiffs' Discovery*

commencing with January 11, 1971 0000 relating to the marking, locating or buoying of the wreck.

As to 1, defendants represented at the hearing that at the time of the collision Texpan had no office in the United States and there was no stationary of Texpan showing any United States address.

IV.

Within ten days after the service of the required answers to the interrogatories or production of documents plaintiffs shall file their answer to the motion of defendants as to *forum non conviens*.

Copies of the report are being mailed to counsel and any objections should be filed with Judge Metzner not later than August 3, 1973.

Dated: New York, New York
July 25, 1973

Respectfully submitted,

MARTIN D. JACOBS
United States Magistrate

**Vessel & Cargo's Letter Dated 26 Jul 1973 to Metzner, J.
Requesting Preservation of Plaintiffs' Oral Deposition
Rights**

BY HAND

July 26, 1973

THE HONORABLE CHARLES M. METZNER
United States District Judge
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

THOMAS I. FITZGERALD, as public administrator v.
Texaco Inc. and Texaco Panama, Inc.

72 Civ. 5008, and consolidated cases 72 Civ.
5009-10, 73 Civ. 92-99, 117, 166 and 182
Poles, Tublin File #12,515 MJT/JJD
Our File Nos. 4246-1, -1A

Your Honor:

As counsel for plaintiff Hapag-Lloyd (owner of the m/v Brandenburg), and for plaintiffs concerned in certain of the cargo laden aboard her at the time of her loss, we write to ask that plaintiffs Rule 31 right orally to depose defendants' representatives concerning witnesses or evidence as to location, marking or buoying of the wreck of the Texaco Caribbean be preserved in Your Honor's eventual order on the subject motion.

We have received today Magistrate Jacob's report of July 25, 1973, which recommends that Your Honor enter an order requiring defendants to answer certain interrogatories and respond to certain requests for production earlier issued by our clients. We wish in this letter not to discuss

*Vessel & Cargo's Letter Dated 26 Jul 1973 to Metzner, J.
Requesting Preservation of Plaintiffs' Oral Deposition
Rights*

the merits of any particular interrogatory or request, these having been gone over individually in detail at the hearing before the Magistrate, but rather to bring to Your Honor's attention an inconsistency in the report which, if uncorrected, would severely limit plaintiffs' ability to resist defendants' motion for the drastic relief of dismissal.

Magistrate Jacobs states at p. 5 of his report that:

"... in view of the importance of the actions and the position of plaintiffs as to the 'situs' of the likely evidence, plaintiffs should now be afforded liberal discovery, but not broad discovery on the merits, as to the location of any witnesses who took part or made any decisions as to locating or marking or buoying the wreckage."

At page 6, the Magistrate also notes plaintiffs' "desire to probe the answers to the interrogatories", and accordingly requires defendants to produce certain categories of documents in areas covered by interrogatories already recommended by the Magistrate. However, the Magistrate then recommends that plaintiffs be required, within 10 days following receipt of defendants' answers or production, to file their papers answering defendants' motion to dismiss the entire case on grounds of *forum non conveniens*.

The problem this recommendation poses is that plaintiffs, if this procedure is followed, will never have any opportunity whatsoever to depose defendants concerning the location of witnesses or evidence as to locating, marking or buoying the Texaco Caribbean's wreckage. Unless such depositions are allowed, plaintiffs will in fact be denied the

*Vessel & Cargo's Letter Dated 26 Jul 1973 to Metzner, J.
Requesting Preservation of Plaintiffs' Oral Deposition
Rights*

"liberal discovery" which the Magistrate recommends they be given.

We respectfully request that Your Honor's eventual order on this motion clarify this matter by insuring that plaintiffs' FRCP Rule 30 (b) (1) right to take the deposition of any person upon oral examination on reasonable written notice is preserved. Where a motion is before the court, as here, which requests the drastic relief of complete dismissal of the action, and having in mind that oral examination will provide plaintiffs their only opportunity to obtain unstudied responses from defendants as to the location of witnesses, documents, and other evidence relevant to the locating, marking, and buoying of the wreckage, plaintiffs earnestly submit they should be allowed the liberal discovery contemplated by the federal rules, and recommended by the Magistrate.

We are authorized to say that Messrs. Fuchsberg & Fuchsberg, counsel for the several death and personal injury claimants in these consolidated actions, join with us in our request.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By MACDONALD DEMING

Attorneys for Plaintiffs Hapag-Lloyd,
Stork Amsterdam N.V. *et al.*

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*Vessel & Cargo's Letter Dated 26 Jul 1973 to Metzner, J.
Requesting Preservation of Plaintiffs' Oral Deposition
Rights*

BY HAND

MARTIN D. JACOBS, United States Magistrate
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

BY HAND

POLES, TUBLIN, PATESTIDES & STRATAKIS
Thirty-Seven Wall Street
New York, New York 10005
Attention: Alvin Stern, Esq.

BY HAND

FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York 10007
Attention: Harvey Goldstein, Esq.

**Texaco Defendants' Letter to Metzner, J. of 27 Jul 1973
Objecting Thereto**

July 27, 1973

HONORABLE CHARLES M. METZNER
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Fitzgerald v. Texaco, Inc. and Texaco Panama,
Inc. 72 Civ. 5008, *et seq* Our File No. 12,515
MJT/JJD

Honorable Sir:

We refer to Messrs. Haight, Gardner, Poor & Havens' letter dated July 26, 1973 concerning Magistrate Jacobs' report of July 25, 1973 in this matter and object to their premature request for oral depositions of defendants.

We have reviewed the Magistrate's report which fully covers the present discovery problems involved in this matter and it is our position that the report should be confirmed as submitted.

Once again, plaintiff's attorneys are attempting to delay the inevitable and are trying to circumvent defendants' Motion to Dismiss for *forum non conveniens*. Having been unsuccessful in obtaining the broad, unlimited discovery sought by way of interrogatories and request for production, plaintiffs now seek to take the oral deposition of defendants "concerning the location of witnesses or evidence as to locating, marking or buoying the Texaco Caribbean's wreckage".

As stated by Magistrate Jacobs in his report, defendants' answers to the revised interrogatories will enable

**Death Claimants' Letter to Magistrate Jacobs of 31 Jul
1973 Requesting Preservation of Plaintiffs' Oral
Deposition Rights**

(Letterhead of Fuchsberg & Fuchsberg)

FUCHSBERG & FUCHSBERG

Counselors at Law

250 Broadway

New York, N.Y. 10007

(212) 962-2800

Honorable Martin D. Jacobs
United States Magistrate
United States District Court
Southern District of New York
Foley Square
New York, N.Y. 10007

Re: Thomas I. Fitzgerald, as Public Administrator
v.

Texaco Inc. and Texaco Panama
72 Civ. 5008 and consolidated cases

Dear Magistrate Jacobs:

This letter is written in support of and in answer to letters previously submitted by co-plaintiffs and by defendants.

Magistrate Jacobs, during all of our discussions, Mr. Deming and I repeatedly stated that we wished to depose defendant Texaco by an officer in New York having knowledge of the corporate and personal relationship between Texaco and Texaco Panama, as well as on the issue of control and authority of the Texaco corporate offices and officers in New York.

It was my understanding, and I am sure, Mr. Deming's, that the faction of the deposition of Texaco was settled. The issue of dominance and control of Texaco Panama by Texaco in the latter's New York office as its principal place of business is of such vital importance to the ultimate question of venue and *forum non conveniens* that I am truly

**Death Claimants' Letter to Magistrate Jacobs of 31 Jul
1973 Requesting Preservation of Plaintiffs' Oral
Deposition Rights**

(Letterhead of Fuchsberg & Fuchsberg)

FUCHSBERG & FUCHSBERG

Counselors at Law

250 Broadway

New York, N.Y. 10007

(212) 962-2800

Honorable Martin D. Jacobs
United States Magistrate
United States District Court
Southern District of New York
Foley Square
New York, N.Y. 10007

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v.

Texaco Inc. and Texaco Panama
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*Death Claimants' Letter to Magistrate Jacobs of 31 Jul
1973 Requesting Preservation of Plaintiffs' Oral
Deposition Rights*

astonished at the absence of any word whatever in your decision. I can only assume that you intend to take up the arrangement of the deposition immediately after the answers to interrogatories are completed.

As such, my sole concern is the period of ten days given for answers to the defendants' motions to dismiss. As Your Honor appreciates, this matter involves multiple claims of varied kinds arising out of a major marine disaster. Before dismissal of a suit, properly brought in New York, with jurisdiction of this action properly reached, it would seem that the plaintiffs should be given every reasonable avenue to probe the matter of defendants' New York authority to control and dominate the worldwide shipping complex known as Texaco in order to show to this Court the extent of local involvement.

Accordingly, may I respectfully request that this matter of the deposition be taken up immediately so that all parties will know exactly what their positions are in order to fully place before this court all of the pertinent information on the issue of *forum non conveniens*.

Thank you for your time and effort herein.

Respectfully submitted,
FUCHSBERG & FUCHSBERG
Attorneys for Thomas I. Fitzgerald,
as Public Administrator
By: HARVEY GOLDSTEIN

E:bir

cc HON. CHARLES M. METZNER
United States District Judge
United States District Court
Southern District of New York
Foley Square, New York, N.Y.
HAIGHT, GARDNER, POOR & HAVENS
POLES, TUBLIN, PATESTIDES & STRATAKIS

**Court's Memorandum Endorsement of 6 Aug 73 on
Texaco Defendants' Motion for Protective Order**

"August 6, 1973. The Court having read the report of Magistrate Jacobs, the letters submitted by counsel in connection with that report, and reviewing the file, confirms the report as submitted.

SO ORDERED:

.....
CHARLES M. METZNER
U. S. D. J.

**Court's Memorandum Endorsement of 6 Aug 73 on
Vessel & Cargo's Order to Show Cause with Stay of
18 May 73**

"August 6, 1973. The Court having read the report of Magistrate Jacobs, the letters submitted by counsel in connection with that report, and reviewing the file, confirms the report as submitted.

SO ORDERED:

.....
CHARLES M. METZNER
U. S. D. J.

**Vessel & Cargo's Notice of Deposition of Texaco
Defendants**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM, and consolidated cases 72 Civ. 5009 and
5010, 73 Civ. 92-99, 117, 166 and 182 CMM

[SAME TITLE]

PLEASE TAKE NOTICE that personal injury plaintiffs in cases 72 Civ. 5008-10, 73 Civ. 92-99 and 73 Civ. 117, by their attorneys Messrs. Fuchsberg and Fuchsberg, and plaintiffs Hapag-Lloyd (73 Civ. 166) and Stork Amsterdam N.V., et al. (72 Civ. 182), by their attorneys Messrs. Haight, Gardner, Poor & Havens, will take the depositions of defendants Texaco, Inc. and Texaco Panama Inc. by their respective Presidents, or by one or more Directors, Officers, or Managing Agents designated by each defendant as having knowledge of the location of witnesses, "documents"*, or other evidence in the possession of, known to or otherwise under the control of defendants Texaco, Inc. and Texaco Panama Inc., relating in any way to the locating, marking, and/or buoying of any part or portion of the wreck(s) of the M/V TEXACO CARIBBEAN.

* As defined in F.R.C.P. Rule 34(a), the word "documents" includes writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by defendants through detection devices into reasonably usable form.

*Vessel & Cargo's Notice of Deposition
of Texaco Defendants*

PLEASE TAKE FURTHER NOTICE that the deposition of the President of Texaco, Inc., or of the individuals designated in his stead by said defendant under Rule 30(b)(6), will take place at Conference Room 1, 22nd Floor, One State Street Plaza, New York, New York 10004, at 10:30 in the forenoon of the second working day following receipt by plaintiffs of full, complete and responsive answers to the interrogatories, and production of papers pursuant to the demand therefor made effective against them by memorandum order of this Honorable Court dated August 6, 1973.

PLEASE TAKE FURTHER NOTICE that the deposition of the President of Texaco Panama Inc., or of the individuals designated in his stead by said defendant under Rule 30(b)(6), will commence immediately following termination of the aforesaid deposition, at the same place and address.

PLEASE TAKE FURTHER NOTICE that counsel are invited to attend and cross-examine if they so desire.

Yours, etc.,

MESSRS. FUCHSBERG AND FUCHSBERG
Attorneys of Personal Injury
Plaintiffs

By /s/ EDWIN A. WEIDMAN
A Member of the Firm
250 Broadway
New York, New York 10007
212-962-2800

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*Vessel & Cargo's Notice of Deposition
of Texaco Defendants*

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs Hapag-
Lloyd and Stork Amsterdam N.V.,
et al.

By MACDONALD DEMING
A Member of the Firm
One State Street Plaza
New York, New York 10004
212-344-6800

To:

POLES, TUBLIN, PATESTIDES & STRATAKIS
Attorneys for Defendants Texaco, Inc.
and Texaco Panama Inc.
37 Wall Street
New York, New York 10005
212-944-0580

**Vessel & Cargo's Notice to Texaco Defendants to Admit
the Truth of Certain Facts**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008, and consolidated cases 72 Civ. 5009 and 5010,
and 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166 and 182
CMM

[SAME TITLE]

PLEASE TAKE NOTICE that Plaintiffs, by their attorneys Haight, Gardner, Poor & Havens and Fuchsberg & Fuchsberg, hereby request, pursuant to Rule 36 of the Rules of Civil Procedure for the United States District Courts, that defendant Texaco Panama, Inc. admit the truth of the following matters:

1. Texaco Panama, Inc. had an office and place of business at 135 East 42nd Street, N. Y., N. Y., 10017 during the month of December, 1967.
2. Texaco Panama, Inc. in the month of December, 1967 caused one or more letters to issue on stationery bearing the following letterhead:

“TEXACO PANAMA, INC.
135 EAST 42ND STREET
NEW YORK, NEW YORK 10017

JOHN I. MINGAY
CHAIRMAN
OF THE BOARD OF DIRECTORS”.

*Vessel & Cargo's Notice to Texaco Defendants to Admit
the Truth of Certain Facts*

3. Texaco Panama, Inc. during the month of December, 1967 addressed one or more letters on said stationery to various owners or disponent owners of vessels then in the Texpan time chartered fleet, which included the following language:

Dear Sirs:

"... we have previously informed you that under a Ship Management arrangement Overseas Tankship (U.K.) Limited would issue voyage orders and handle ship positions, ETS's, ETD's, etc., on behalf of the Texpan time chartered fleet.

On November 20, 1967 the name of Overseas Tankship Limited.

Effective January 1, 1968, Texaco Overseas Tankship Limited will expand their function of Ship's Managers and also handle the operations and routine business of vessels owned and chartered by Texaco Panama Inc., under the Ship Management Agreement.

All invoices, including those covering supplemental charter hire, should be forwarded to London for processing; however, payment of hire and matters pertaining to charter party terms will continue to be handled by Texaco Panama Inc. in New York.

* * *

Kindly instruct the Master(s) of your vessel(s) of the foregoing, with specific reference to Deck and Engine abstracts, Notices of Readiness, Report of Soundings and Cargo Tank Dry Receipt. However, Ship Utilization Reports should continue to be sent to New York.

*Vessel & Cargo's Notice to Texaco Defendants to Admit
the Truth of Certain Facts*

Please acknowledge receipt and understanding of
this letter.

Very truly yours,

JOHN I. MINGAY

Yours, etc.

HAIGHT, GARDNER, POOR & HAVENS

By /s/ Macdonald Deming
A Member of the Firm
Attorneys for Hapag, Lloyd &
Stock Amsterdam M/V et al.
One State Street Plaza
New York, NY 10004
DI. 4-6800

FUCHSBERG & FUCHBERG

By /s/ Harvey Goldstein
A Member of the Firm
Attorneys for Personal Injury
Plaintiffs
250 Broadway
New York, N. Y. 10007
962-2800

To:

Messrs. Poles, Tublin, Patestides & Stratakis
Attorneys for Defendants
Texaco and Texaco Panama
37 Wall Street
New York, N. Y. 10004

Affidavit of Service

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PETER O. ONUOHA, being duly sworn, deposes and says; that he is over 21 years of age, and a resident of 40 Washington Street, East Orange, New Jersey.

That on the 10th day of August, 1973, he served a true copy of the within notice to admit on Poles, Tublin, Patestides & Stratakis, attorneys for defendants, by delivering and leaving same in a conspicuous place in said attorneys' offices, at 37 Wall Street, in the Borough of Manhattan, City of New York.

/s/ PETER O. ONUOHA
Peter O. Onuoha

Sworn to before me this
14th day of August, 1973.

[SEAL]

Texaco Defendants' Objection to Plaintiffs' Notice to Admit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases), 72 Civ 5009
and 5010, 73 Civ 92, 93, 94, 95, 96, 97, 98, 99, 117, 166 and
182

[SAME TITLE]

Defendant, TEXACO PANAMA INC., hereby objects to plaintiffs' Notice to Admit, in its entirety, for the following reasons:

1. In view of Plaintiffs' recent discovery motion and defendant's motion for a protective order; the resolution of those motions by the report of Magistrate Jacobs; and the Orders of this Court dated August 6, 1973 confirming the Magistrate's report as submitted; the service of the Notice to Admit at this stage of the litigation constitutes harassment, vexation and a complete disregard for the orders of the court. Plaintiffs, at this point, are only entitled to the discovery enumerated in the recent report of Magistrate Jacobs, as ordered by the court, and are not entitled to any further discovery until such time as defendants' Motion to Dismiss is decided.

2. In any event, the admissions sought are totally irrelevant and immaterial to the issues in the case, and

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*Texaco Defendants' Objection to Plaintiffs' Notice to
Admit*

most especially the sole issue of forum non conveniens which
is the only issue now presently pending before this court.

Yours, etc.,

POLES, TUBLIN, PATESTIDES & STRATAKIS
Attorneys for Defendants

By: /s/ ALVIN L. STERN
A Member of the Firm
37 Wall Street
New York, N. Y. 10005
944-0580

**Plaintiffs' Joint Supplemental Notice of Deposition of
Texaco Defendants**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM, and Consolidated cases, 72 Civ. 5009
and 5010, 73 Civ. 92-99, 117, 166 and 182 CMM

[SAME TITLE]

PLEASE TAKE NOTICE that personal injury plaintiffs in cases 72 Civ. 5008-10, 73 Civ. 92-99 and 73 Civ. 117, by their attorneys Messrs. Fuchsberg and Fuchsberg, and plaintiffs Hapag-Lloyd (73 Civ. 166) and Stork Amsterdam N.V., et al (72 Civ. 182), by their attorneys Messrs. Haight, Gardner, Poor & Havens, will take the depositions of defendants Texaco, Inc. and Texaco Panama Inc. by their respective Presidents, or by one or more Directors, Officers, or Managing Agents designated by each defendant having a knowledge of the names and addresses of the corporate officers and directors of the defendants, the position of each in said defendant or defendants; the location of the offices and principal place of business of the defendants and the authority, duties and responsibilities of each office; the relationship of the defendants each to the other, including stockholdings of each in the other, both in percentage of shares of the whole and in value, dual or common officers and directors, and all questions concerning the management, operation and control of the business of Texaco Panama Inc. by Texaco, Inc., including, but not by way of limitation, the movement of vessels and more particularly, the "TEXACO CARIBBEAN" from the commencement of its

*Plaintiffs' Joint Supplemental Notice of Deposition of
Texaco Defendants*

voyage which culminated in the events, the subject of this lawsuit; as having knowledge of the location of witnesses, "documents"*, or other evidence in the possession of, known to or otherwise under the control of defendants Texaco, Inc. and Texaco Panama Inc., relating in any way to the locating, marking, and/or buoying of any part or portion of the wreck(s) of the M/V TEXACO CARIBBEAN.

PLEASE TAKE FURTHER NOTICE that the deposition of the President of Texaco, Inc., or of the individuals designated in his stead by said defendant under Rule 30(b)(6), will take place at Conference Room 1, 22nd Floor, One State Street Plaza, New York, New York 10004, at 10:30 in the forenoon of the second working day following receipt by plaintiffs of full, complete and responsive answers to the interrogatories and production of papers pursuant to the demand therefor made effective against them by memorandum order of this Honorable Court dated August 6, 1973.

PLEASE TAKE FURTHER NOTICE that the deposition of the President of Texaco Panama Inc., or of the individuals designated in his stead by said defendant under Rule 30(b)(6), will commence immediately following termination of the aforesaid deposition, at the same place and address.

* As defined in F.R.C.P. Rule 34(a), the word "documents" includes writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by defendants through detection devices into reasonably usable form.

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*Plaintiffs' Joint Supplemental Notice of Deposition of
Texaco Defendants*

PLEASE TAKE FURTHER NOTICE that counsel are invited
to attend and cross-examine if they so desire.

Yours, etc.

MESSRS. FUCHSBERG AND FUCHSBERG
Attorneys for Personal Injury
Plaintiffs

By /s/ SEYMOUR FUCHSBERG
A Member of the Firm
250 Broadway
New York, New York 10007
212-962-2800

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs Hapag-
Lloyd and Stork Amsterdam
N.V., et al.

By /s/ MACDONALD DEMING
A Member of the Firm
One State Street Plaza
New York, New York 10004
212-344-6800

To:

POLES, TUBLIN, PATESTIDES & STRATAKIS
Attorneys for Defendants Texaco, Inc.
and Texaco Panama Inc.
37 Wall Street
New York, New York 10005
212-944-0580

**Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973**

Sept. 18, 1973

File No.

72 Civ 5008—CMM

Raymond F. Burghardt,
Clerk of the Court
United States District Court
Southern District of
New York, N.Y.

Dear sir:

The enclosed Memorandum is intended to be filed as a supplement to the Amicus Curiae Motion with accompanying application for joinder of plaintiffs in the above entitled action. The Amicus Curiae information was presented the court on Aug. 3, 1973.

Your cooperation in seeing to it that this Memorandum is presented to Judge Metzner and is filed in the papers of the case is indeed appreciated.

Thank you for your cooperation.

Very truly yours,

/s/ RORERT BORDEN
Robert Borden

RB: ed

Note: The file No. above is the action into which 73 Civ 117, 73 Civ 99, 73 Civ 98, 73 Civ 97, 73 Civ 96, 73 Civ 95, 73 Civ 94, 73 Civ 93, 73 Civ 92, 72 Civ 5010—have all been consolidated.

*Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

ERNEST KOHN, et al,
ADOLF HERGOVICH, et al,
CHRISTA RENATE HORNEI, et al,
ALFRED RICHTER, et al,
ROLF WIZSWEDE, et al,
IRENE DIRKSEN, MARTIN LUTHER, ELSEBERT LUTHER, et al,
(joint heirs)
MICHAEL ZBOROWSKI, ANNA ZBOROWSKI, et al, (in their
interest coupled with that of Christa Hornei above).

—against— *Plaintiffs,*

NAVIERA MARTIMA FLUVIAL S. A.
TEXACO INC.
TEXACO PANAMA INC.
HAMBURG AMERIKA LINE

Defendants,

PEPE OLIMPIA, et al,
ANNA FERRO, et al,
LUCIANNA GIURINI, et al,
ANGELA MINERVINI, et al,

—against— *Plaintiffs,*

NAVIERA MARTIMA FLUVIAL S. A.
TEXACO INC.
TEXACO PANAMA INC.

Defendants,

PLAINTIFFS' MEMORANDUM

LIABILITY

The Paracas collided with the Texaco Caribbean in the English Channel. The collision allegedly occurred because

*Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973*

of the unsafe and unseaworthy condition of the two vessels and the negligence of the defendants. Note: the plaintiffs of the Texaco Caribbean decedents, who are the personal representatives of the estates of the deceased crew members, make no claim against Hamburg Amerika Line. Upon contact with the Paracas, the Texaco Caribbean, exploded and sank; less than 24 hours later the Brandenburg collided with the wreckage of the Texaco Caribbean and went to the bottom with the loss of 22 crew members. It is alleged that the entire transaction: the Paracas-Texaco Caribbean collision followed by the explosion on the Texaco Caribbean and the subsequent sinking of the Brandenburg was one unbroken chain of events so linked together as to constitute a natural whole. Within the context of this series of events, the defendant, Hamburg Amerika Line used its vessel the Brandenburg so negligently as to cause the deaths of its seamen. Additionally, it is alleged that the Brandenburg was unsafe and unseaworthy. The plaintiffs in the Brandenburg disaster are the personal representatives of the estates of the deceased crew members.

The applicant here, Robert Borden, Attorney for certain of the claimants, has requested this Court to join both his clients of the Texaco Caribbean and his clients of the Brandenburg in the actions already before this court on the grounds that the Brandenburg claimants all have identical interests and since the sinking of the two vessels occurred in one whole transaction, multiplicity of actions will be avoided if justice is rendered for all in this common forum. (See Applicant's Amicus Curiae Motion coupled with petition for Permissive Joinder with Exhibit B attached thereto).

*Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973*

CAPACITY (of the claimants) — (of Robert Borden).

It is represented to the Court that immediately local attorney of record is appointed arrangements will be made with the Hon. Thomas I. Fitzgerald, Public Administrator of the County of New York, to be appointed as the Administrator of the estates of the decedents, thereupon an application will be made to the Court to substitute him in place of the present named plaintiffs.

The authority for this procedure is *Russell v. New Amsterdam Casualty Co.*, 303 F. 2d 674 (1962). At this point all procedural requisites will be accomplished.

Note: The applicant is perfectly willing to cooperate fully with Fuchsberg & Fuchsberg as Attorney of Record. It is suggested that the issue of dispute as to representation of certain clients should be resolved by such cooperation.

THE PARTYS DEFENDANT

On the facts, (Exhibit B, attached to application for permissive joinder) Hamburg Amerika Line should be a defendant in this action. This entity is available in New York where it does extensive business, and where it maintains an office. However, the applicant is again willing to cooperate with Fuchsberg & Fuchsberg in this regard, as concerns the Brandenburg claimants.

It is difficult to understand why the action before the court does not include the Paracas and Naviera Maritima Fluvial S. A. as defendants. However, again the applicant is willing to cooperate with Fuchsberg & Fuchsberg.

JURISDICTION

Texaco Caribbean

*Attorney Robert Borden's Memorandum in Support of
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His Letter to Clerk Burghardt of 18 Sep 1973*

The deceased crew members of this vessel were Italian nationals who were hired in Italy by Texaco Overseas Tankship Ltd, a British corporation. Texas Overseas Tankship Ltd is a wholly owned property of Texaco Inc, New York (Oil And Petroleum Year Book).

International Register (Petroleum). On the facts, as alleged, in the applicants Exhibit B attached to the Motion for Permissive Joinder, the overwhelming predominance of interests involved in this case are American. Texas Overseas Tankship Ltd. is a mere instrument of Texaco Inc. in New York. This is the status assigned that entity by R. Willoch, Vice President of Texas S. P. A. (the Italian subsidiary of Texaco Inc.) in a letter written to Captain F. Giurini of the Texaco Caribbean, on June 12, 1969. In the second paragraph of the letter Mr. Willoch tells Captain Giurini: "The recommendations submitted by each fleet are being considered by Texaco Overseas Tankship in London and the final decision will be made by Marine Department Management in New York." And again in the same letter p. 2 a)

"The time on which you would be assigned to Bahrain, if selected will depend entirely upon the decision taken by management in New York"

Upon information and belief, Mr. Willoch in 1971 was also Manager of Operations, of Texaco Inc. whose address is 135 East 42nd St., New York, New York. He was also a Vice President of Texaco Inc. and served as aide to Mr. John Mingay, Chairman of Texaco Inc., New York. It is

*Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973*

submitted that there should be no problems in obtaining categorical testimony from the pre dominant American interests involved in this controversy since the key entity Texaco Inc. and the key facade Texaco Panama, operate out of headquarters in New York and are available as are the key executives who make all the "final decisions". Copy of the Willoch letter attached hereto and incorporated herein as Exhibit A.

Please note also that it is Texaco Inc. who speaks for the legal liabilities of Texaco Panama Inc. and it is an American Co. in Connecticut who insures such liabilities.

(Letter attached, W. J. Sweeney, senior attorney for Texaco Inc., Feb 18, 1972, Exhibit B.)

What forum is convenient?

In this case the only forum which is convenient is the one in New York. There is no alternative, available and more convenient forum in Italy. Italy is a mere recruitment center for the "crew of convenience" hired by Texaco Panama Inc. The only Texaco presence in Italy is Texaco S. P. A. which has no relationship whatsoever to either the events or the people involved. The witnesses are in Peru, Italy, and the United States. Testimony can be produced in this Court by deposition. The increment of official investigations is easily available to this court. Italian laws deny the seaman or his representative a reasonable opportunity to invoke the damage provisions of tort principles by setting up a situation where the claimant must first prove a criminal proceeding before he can commence a civil suit.

The common forum is the United States Admiralty Court. *Gulf Oil Corporation v. Gilbert*. 330 U. S. 501, 67 S. Ct. 839.

*Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973*

SETTLEMENTS

No settlement has been made which constitutes a bar to this action.

The alleged settlements were made pursuant to Italian law. The dependents of the deceased crewmen of the Panama flag ship, Texaco Caribbean are receiving pensions or have received indemnities from the Italian Social Insurance Institute. (Letter, The Travelers, March 14, 1972, John C. Settle, attached as Exhibit C.)

These settlements do not constitute a bar.

Hertel v. American Export Lines Inc.

225 F. Supp. 703 (1964).

Reed v. Steamship Yaka

373 U.S. 410, 83 S. Ct. 1349 (1963)

Under Italian law, the receipt of indemnities or pensions from the Social Insurance Institute or the equivalent does not prevent a dependent in an Italian Court from maintaining an action for his injuries. Corte di Cassazione, Oct 23, 1954, Il Diritto Marittimo, 1955, p. 372.

A release under Workmen's Compensation Law including the third-party tortfeasor has not legal effect in an action against another tort-feasor. Nor does such release constitute a bar to a maritime claim. Lamoreux v. San Diego and Arizona Eastern R. R. Co. (1957) 48 Cal, 2d 617, 311 F. 2d 1.

The proffered releases in the instant case do not constitute admissible evidence, and even if they did, the defendant would still have the burden of proof that the consideration paid constituted full accord and satisfaction for the pecuniary losses in the death claims.

*Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973*

Garrett v. Moore-McCormack Co. 317, U. S. 237,
6 S. Ct. 246

A factual situation exists herein entitling a personal representative to invoke the provisions of 46 U. S. C. A. 761, 762, commonly known as DEATH ON THE HIGH SEAS ACT.

Under the Death on the High Seas Act, the Federal Court has the sole and exclusive authority to pass upon and apportion settlements.

Rademaker's Estate, 2 N. Y.S 2d 309 166 Misc. 201,
9 1938)

Egan v. Donaldson Atlantic Line, DCNY 1941, 37
F. Supp. 909

Middleton v. Luckenback S. S. Co. Inc., (CANY
1934) 70 F 2d, 326, cert den. 55 S. Ct. 89, 293, U. S.
577

Batkiewicz v. Seas Shipping Co. (DCNY 1943) 53
F. Supp. 802

The District Courts of the United States in Admiralty are vested with the exclusive authority pursuant to 46 U. S. C. A. 762, et seq. to make apportionment among the dependents and next of kin in claims predicated on the provisions of the Act; no one may release or extinguish such claim without the Court's approval.

In re Nelson, 5 N. Y. S. 2d, 398, 401 (1938)

See also,

In re Southern Steamship Company's petition, 135
F. Supp. 358

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*Attorney Robert Borden's Memorandum in Support of
Motion for Joinder of New Plaintiffs Under Cover of
His Letter to Clerk Burghardt of 18 Sep 1973*

Fornaris v. American Surety Co. of N. Y. Dc Puerto
Rico, 1960, 183 F. Supp. 339

In re Rodemaker's Estate (1938) 2 N. Y. S. 2d 309,
166 Misc. 201

The Death on the High Seas Act is applicable to the
instant case, which arose from a collision on the high seas.

The Buenos Aires, 5f 2d 425

The Scotland, 105, U. S. 24, 29

The Belgenland, 114 U. S., 355, 5 S. Ct. 860.

CONCLUSION

This case is part and parcel of an entire sequence of
events involving a situation which is being litigated in this
court. Justice requires that the litigation should be opened
up to the claims of the applicant's clients.

Respectfully submitted,

/s/ ROBERT BORDEN
Robert Borden
Attorney for Plaintiffs.

Exhibit A—Annexed to Robert Borden Memorandum

Palermo, June 12, 1969

**PERSONAL AND
CONFIDENTIAL**

Captain F. Giurini
S/S Texaco Caribbean

Dear Captain Giurini,

I have received your letter of June 7th advising me of your private discussion with Mr. O. L. Fulton and your decision to accept the position of Marine Superintendent at Bahrain should you be selected.

A very important point which may not have been properly stressed or which you may have misunderstood is the fact that you are our candidate from the Texpan fleet for this position. If I had not made it sufficiently clear to Mr. Fulton prior to his discussion with you I apologize for any misunderstanding. However, I wish to emphasize now that you are one of several candidates chosen from all Texaco fleets for this position. The recommendations submitted by each fleet are being considered by Texaco Overseas Tankship in London and the final decision will be made by Marine Department Management in New York. A final decision has not been reached, and if you are the man selected we will communicate with you and arrange for your relief.

Of course, I both officially and personally hope that you are the man selected for the job, because all of us in this organization feel that you are eminently qualified. On the other hand, I have no way of knowing on what grounds the final selection will be made. Although I can assure you that your professional and personal qualifications are of the highest, other factors may have a bearing

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Exhibit A—Annexed to Robert Borden Memorandum

on the final selection. Therefore, I wish to tell you now that, should you not be chosen, it would not be because of your ability.

To answer the question which you asked in your letter, I can answer as follows:

- a) The time on which you would be assigned to Bahrain, if selected, will depend entirely upon the decision taken by Management in New York.
- b) With respect to wages, it is expected you would retain Master salary and remain on the Texpan payroll for the twelve-month period specified. In addition, the Company would provide suitable living accommodation plus the equivalent of Pound Sterling 100 per month living allowance.
- c) As long as you would remain on Texpan payroll, your family will continue to be covered with respect to medical insurance in the same manner as at present. Again I must emphasize that you are one of several candidates and that the final selection has not yet been made. However, I wish you the best of luck and sincerely hope that you are chosen.

Very truly yours,

/s/ R. WILLOCH
R. Willoch
Vice President

RW: la

200a

Exhibit B—Annexed to Foregoing Memorandum

TEXACO INC.

135 East 42nd Street
New York, N.Y. 10017

February 18, 1972

W. J. Sweeney
Senior Attorney
Robert Borden, Esq.
Counselor at Law
181 Grover Street
Everett, Massachusetts 02149

SS Texaco Caribbean—Crewman Gerardo
Minervini, Deceased Our File 1000

Dear Mr. Borden:

This will acknowledge receipt of your letter of February 7, 1972, addressed to Texaco Panama Inc., advising that you have been retained to represent Mrs. Angela De Candia, the mother of Gerardo Minervini, a decedent seamen of the SS Texaco Caribbean.

The references in your letter to Naviera Maritima Eluvia S.A. and to Hamburg Amerika Line are not understood as well as your references to claims represented by you. Your letter of February 7, 1972 in respect to Mrs. De Candia is our first notice of your representation of any claimant in this matter.

Since any legal liabilities of the SS Texaco Caribbean and of Texaco Panama Inc. are covered by insurance, I have referred your letter to Texaco Panama Inc.'s legal liability underwriters, The Travelers Insurance Company in Hartford, Connecticut, for attention and any reply or further handling. Should you wish to correspond further on this matter, I would suggest that you communicate directly with The Travelers Insurance Company or any representative designated by them.

Yours very truly,

/s/ W. J. SWEENEY

WJS:LA

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Exhibit C—Annexed to Foregoing Memorandum

(Letterhead of The Travelers Insurance Company)

March 14, 1972

Robert Borden, Esq., Counselor at Law
181 Grover Street
Everett MA 02149

Dear Mr. Borden:

Re: The SS Texaco Caribbean

Gerardo Minervini, Deceased

Your letter of February 7, 1972, addressed to Texaco Panama, Inc. advising of your representation on the above styled case has been referred to this office for attention and reply. Travelers Insurance Company infers the legal liabilities of the SS Texaco Caribbean and Texaco Panama, Inc.

Please be advised that our representatives have consummated a settlement with Mrs. DeCandia under the Italian law. We must respectfully decline your claim.

Very truly yours

/s/ JOHN C. SETTLE

John C. Settle, Assistant Secretary
Casualty-Property Department
Ocean Marine Division

JCS:JZ

**Borden Letter to Clerk Burghardt of 8 Oct
1973 Re Alleged Retainer**

October 8, 1973
File No.
72 Civ 5008 CMM

Raymond F. Burghardt
Clerk of the Court
United States District Court
Southern District of
New York, N.Y.

Dear sir:

On Aug. 3, 1973, I filed an Amicus Curiae Motion informing the court of the interest of certain associated attorneys and my interest in the above entitled action.

Recently, I received a reaffirmation of a certain retainer which is pertinent to the business of this case. I include a copy of this retainer in this letter to you.

I have marked this affirmed retainer Exhibit I and I have attached it to a copy of this letter also marked Exhibit I.

Will you file this Exhibit and letter in the papers of this case so that Judge Metzner will understand that this client has restated his retention of my services?

Thank you for your gracious cooperation.

Very sincerely,

/s/ ROBERT BORDEN
Robert Borden

RB:ed

Note: The file # above is the action into which 72 Civ 117, 73 Civ 99, 73 Civ 98, 73 Civ 97, 73 Civ 96, 73 Civ 95, 73 Civ 94, 73 Civ 93, 73 Civ 92, 72 Civ 5010—have all been consolidated.

*Exhibit I—Borden Letter to Clerk Burghardt of 8 Oct 1973
Re Alleged Retainer*

Exhibit I

Mr. Robert Borden
Attorney at Law
c/o 4319 So. 135th St.
Seattle, Wash. 98168
U.S.A.

The Client must complete this retainer agreement fully. Be sure that the client places his signature where the X is marked.

The Client (NAME) Ernst Kohn (ADDRESS) 6702 Bad Durkheim, Dresdener Str. 26, West Germany Date: Okt. 1, 73 retains the Attorney Robert Borden, 181 Grover St. Everett, Mass. U.S.A. to perform the legal services mentioned in (1) below. The Attorney agrees to perform them faithfully and with due diligence.

1. The claim, controversy and other matters with reference to which the services are to be performed are: To prosecute all of the client's rights arising out of the demise or injury to:

(name of decedent or injured) Christian Kohn (relationship to Client) Son.

2. The contingency upon which compensation is to be paid is: Settlement of the claim or the collection of a judgment sum awarded by the court for the claim.

3. Reasonable compensation on the foregoing contingency is to be paid by the client to the attorney. Such compensation (including that of any associated counsel) is not to exceed % 40 of the total recovery if litigated or 33½ if settled out of court. Reasonable expenses and disbursements are to be advanced by the attorney chargeable to the client.

*Exhibit I—Borden Letter to Clerk Burghardt of 8 Oct 1973
Re Alleged Retainer*

4. The Attorney will submit all reasonable offers of settlement to the client. Neither he or any associated lawyer will proceed to any settlement unless the Client and all the attorneys involved in the representation of the client agree upon the terms and the sum in advance.

/s/ ERNST KOHN

.....
(Signature of Client or Clients)

/s/ ROBERT BORDEN

.....
(Signature of Attorney)
Robert Borden

Client's personal information

1. Widow's name and her birthdate:
2. Children's names and birthdates:
.....
3. Parents names and birthdates (as next of kin if there is no widow) Ernst Kohn, 8.1.21 (father—Frieda Kohn, geb. Pettke, 19.10.22 (mother).
4. On the back of this page list every money contribution which the decedent made for the support of dependents. List the names, ages and the relationship to the decedent of every person in the household. State any monies you have received in so called "settlement". Send a copy of any release or settlement signed by you to me immediately.

Note: your copy of this agreement will be sent to you immediately upon receipt by this office.

**Texaco Defendants' Answers to Plaintiffs'
Interrogatories**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

72 Civ 5008 CMM (and consolidated cases), 72 Civ. 5009
and 5010, 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166
and 182

[SAME TITLE]

Defendant, TEXACO PANAMA INC., by its attorneys,
Poles, Tublin, Patestides and Stratakis, answering the in-
terrogatories propounded by plaintiffs states upon informa-
tion and belief as follows:

QUESTION

1. Identify each office of Texaco Panama Inc., the
representative in charge thereof and the functions there
performed.

ANSWER

Texaco Panama Inc. has, and at the time of the subject
casualty had, only one office located at Via Transmica
Panama, Republic of Panama. Texaco Panama Inc. is a
company engaged in the marketing of petroleum products
in the Republic of Panama and in worldwide marine trans-
portation. The company's marketing operations include
ownership of facilities in Panama City and Colon and its
products are marketed by 31 service stations throughout
the Republic of Panama. Marine Transportation operations

Texaco Defendants' Answers to Plaintiffs' Interrogatories

include ownership of vessels engaged in the worldwide transportation of petroleum products.

In January, 1971 the person in charge of said office was Mr. Michael I. Malcolmson.

<i>1971 Address</i>	<i>Present Address</i>
c/o Texaco Panama Inc.	Rua Getulio Dos Nedes 26
Trans Isthmian Highway	Rio de Janeiro
Panama City, Panama	Guanabara, Brazil

The person presently in charge of said office is Mr. Robert R. Dimock whose address is: Edificio Cerro, Bonito, Calle 1A, Parque Lefeoire, Panama, Republic of Panama.

QUESTION

3. If Texpan has been authorized to transact business in the State of the New York, please identify the date of the initial authorization, and state whether that authorization is still in effect.

ANSWER

Texaco Panama Inc. has never been authorized to transact business in the State of New York.

QUESTION

5. Please identify, by office address, the Texpan office(s) responsible from December 1, 1970 through February 28, 1971 for the following operations:

g. wreck location.

Texaco Defendants' Answers to Plaintiffs' Interrogatories

- h. wreck removal; and
- i. salvage of Texpan vessels.

Since Texpan at the aforementioned times only had one office, the ultimate responsibility for the above functions would rest in that office. However, the day-to-day operation of the Texpan owned vessels, including problems of wreck location, wreck removal, salvage, and decisions to be made with respect thereto had at the time specified been delegated to Texaco Overseas Tankship Ltd. (TOT). TOT performed the above mentioned functions through its offices in Monte Carlo and London.

QUESTION

- 6. Who in these offices decides, or has power to decide:
 - c. whether salvage, or wreck removal was to be undertaken with regard to Texaco Caribbean;
 - e. what steps were to be taken, if any, to locate and/or mark the wreck of the Texaco Caribbean.

ANSWER

Since actual authority and responsibility for the above was delegated to the offices of TOT, the personnel who made decisions or had power to make decisions in the above matters would be and in fact was the Managing Director of TOT and the General Manager of TOT's Monte Carlo office.

Texaco Defendants' Answers to Plaintiffs' Interrogatories

QUESTION

8. State the name of any person residing in the United States, now or at the time of the collision, who had any discussion or communication or participation in decisions as to locating, marking or removing the wreck.

ANSWER

All discussions, communications and participation in decisions relative to locating, marking or removing the wreck of the TEXACO CARIBBEAN involved persons located in England and Monte Carlo. Some communications of an informational nature, however, were received by the below listed persons.

1. Mr. John I. Mingay
 - (a) Present Address
Seaside Towers
95 Throncliffe Drive
Toronto, Ontario, Canada.
 - (b) Address in January 1971
247 South Compo Road
Westport, Connecticut
2. Mr. H. R. Cristensen
 - (a) Past and Present Address
226 McKinley Place
Ridgewood, New Jersey

In addition, it should be noted that there were articles that appeared in various United States newspapers on or about the time of the occurrence herein. These articles contained much the same information as that received by the above listed persons.

Texaco Defendants' Answers to Plaintiffs' Interrogatories

QUESTION

21. Please set out in detail each and every term of the Ship Management Agreement in effect between Texpan and TOT on January 11, 1971 relating to whether there is authority in any representative residing in the United States to employ anyone to locate or mark a wreck.

ANSWER

The Ship Management Agreement between Texpan and TOT does not give any authority to any person residing in the United States to employ anyone to locate or mark a wreck.

Dated: New York, New York
October 5, 1973

POLES, TUBLIN, PATESTIDES & STRATAKIS

By /s/ ALVIN L. STERN
Member of the Firm
Attorney for Defendant,
Texaco Panama Inc.
37 Wall Street
New York, New York 10005
(212) 944-0580

Texaco Defendants' Answers to Plaintiffs' Interrogatories

To:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs, Hapag
Lloyd, Stork Amsterdam, et al
One State Street Plaza
New York, New York 10004

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs,
Thomas I. Fitzgerald, etc.
250 Broadway
New York, New York

Texaco Defendants' Answers to Plaintiffs' Interrogatories

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN J. DEVINE, being duly sworn, deposes and says:

1. I am an attorney at law, associated with the firm of POLES, TUBLIN, PATESTIDES & STRATAKIS, attorneys for the defendant, Texaco Panama Inc., herein.

2. I have read the foregoing Answers to Interrogatories and know the contents thereof and that the same is true to the best of my knowledge or information and belief.

3. The sources of my information and the grounds of my belief are statements, records, documents and information supplied to me by agents and employees of the defendant.

4. The reason this verification is made by deponent and not by said defendant is that said defendant is a foreign corporation.

/s/ JOHN J. DEVINE, JR.
John J. Devine, Jr.

Sworn to before me this
5th day of October, 1973.

BEATRIX DES MARETS DODD

**Texaco Defendants' Response to Plaintiffs' Request for
Production of Documents**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases), 72 Civ. 5009
and 5010, 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166 and
182.

[SAME TITLE]

Defendant, Texaco Panama Inc., by its attorneys, Poles, Tublin, Patestides and Stratakis, in response to plaintiffs' Request for Production of Documents, states as follows:

4. Produce all documents between Texaco, Texpan, and TOT, on the one hand and Smit-Tak and Smit-Tug on the other hand, for the period of five days commencing with January 11, 1971, 0000 hours, relating to marking, locating or buoying of the wreck.

Attached is a copy of the only telex sent or received during said time. The telex was sent by Smit-Tak, London to TOT, London, confirming a bid made by Smit-Tak to TOT regarding salvage and diving operation on the wreck of the Texaco Caribbean.

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*Texaco Defendants' Response to Plaintiffs' Request for
Production of Documents*

Dated: New York, New York
October 5, 1973

POLES, TUBLIN, PATESTIDES & STRATAKIS

By /s/ ALVIN L. STERN
Member of the Firm
Attorneys for Defendant,
Texaco Panama Inc.
37 Wall Street
New York, New York 10005
(212) 944-0580

To:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs, Hapag
Lloyd, Stork Amsterdam, et al
New York, New York 10004

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs,
Thomas I. Fitzgerald, etc.
250 Broadway
New York, New York

*Texaco Defendants' Response to Plaintiffs' Request for
Production of Documents*

TEXKNIGHT B LON

SMIT TAK LONDON

TELEX NO 884456

Attention Captain Watson Marine Superintendent

Please urgently convey to above gentlemen the following message

"TEXACO CARRIBBEAN":

Sunk off Folkstne

Reference our earlier telcon concerning charter of "Bever" salvage vessel to carry out diving in accordance your requirements we confirm offering on daily charter as follows.

Dutch guilders 4250 per day (exchange rate 8.55 to pound) of 24 hours time coommences upon vessels departure from Rotterdam until vessels return to Rotterdam on completion of work.

The above is inclusive all bunkers consumed, any port charges etc. also messing for charterers personnel and all diving services performed.

We understand that there may be a reuirement to pick up your representative at Dover en route to location and return via Dover.

Plans of the vessel can be made available to assist divers. This offer is made subject vessel available and, we understand that a decision may be made at approx 1600 hours today.

Message ends.

Well received??

Yes well recd thanks

**Vessel & Cargo's Order to Show Cause with Stay of 12
Oct 73**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

72 Civ. 5008, and Consolidated Cases, 72 Civ. 5009 and
5010, and 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166
and 182 CMM

[SAME TITLE]

NOW UPON the annexed affidavit of MacDonald Deming,
Esq., with exhibits, and supporting Memorandum of
Authorities,

IT IS HEREBY ORDERED that defendants Texaco, Inc. and
Texaco Panama, Inc. are to show cause before Magistrate
Jacobs of this Court in Room 1602, United States Court-
house, Foley Square, Manhattan, on Friday, the 19th day
of October, 1973, at 10 o'clock in the forenoon, or as soon
thereafter as counsel may be heard, who shall hear this
application and report to the Court why an Order should
not be handed down herein as follows:

1. Requiring defendants Texaco, Inc. and Texaco
Panama, Inc., pursuant to plaintiffs' notice of deposition
served upon defendants August 13, 1973, to make available
Mr. John I. Mingay of Toronto, Canada, and Mr. H. R.
Cristensen, of Ridgewood, New York, or others, for
deposition;

2. Requiring defendant Texaco Panama, Inc. to make
full and complete response to plaintiffs Hapag-Lloyd's and

Vessel & Cargo's Order to Show Cause with Stay of
12 Oct 73

Stock Amsterdam, N.V., revised interrogatories, as modified by Magistrate Jacobs' report of July 1973;

3. Determining that defendant Texaco Panama, Inc.'s objection to plaintiffs' notice to admit of August 10, 1973, is not justified, and requiring defendant to serve its answer to said notice; and

4. Providing that plaintiffs must file their papers in opposition to defendants' motion to dismiss within twelve days after full and satisfactory compliance by defendants with points 2 and 3 above, and/or within twelve days after receipt by plaintiffs of full, complete and signed transcripts of all depositions taken pursuant to point 1 above, whichever occurs latest;

AND IT IS FURTHER ORDERED that personal service of a copy of this order, and of the papers upon which the same is granted, on Messrs. Poles, Tublin, Patestides & Stratakis, as attorneys for defendants Texaco, Inc. and Texaco Panama, Inc., and upon Messrs. Fuchsberg & Fuchsberg, as attorneys for plaintiff Thomas I. Fitzgerald, Public Administrator, who together with attorneys for movants are all the attorneys concerned in this action, on or before 4:00 P.M., Friday, October 12, 1973, shall be sufficient service of this order;

AND IT IS FURTHER ORDERED that all other proceedings in these actions be and hereby are stayed until the hearing and determination of this motion brought on by order to show cause, and the subsequent entry of an order thereupon.

217a

Vessel & Cargo's Order to Show Cause with Stay of
12 Oct 73

New York, New York

Dated: October 12, 1973.

/s/ CHARLES M. METZNER
U.S.D.J.

To:

POLES, TUBLIN, PATESTIDES & STRATAKIS
37 Wall Street
New York, N. Y. 10005

FUCHSBERG & FUCHSBERG
250 Broadway
New York, N. Y. 10007

HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, N. Y. 10004

**Affidavit in Support of Application for Order to Show
Cause with Stay**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

72 Civ. 5008, and Consolidated Cases, 72 Civ. 5009 and
5010, and 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166
and 182 CMM

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MAC DONALD DEMING, being duly sworn, hereby deposes
and says:

1. I am a member of the Firm of Haight, Gardner,
Poor & Havens, attorneys for plaintiffs Hapag Lloyd A.G.
(73 Civ. 166) and Stork Amsterdam N.V., et al. (73 Civ.
182), and am familiar with all the pleadings and proceed-
ings heretofore had in this matter. This affidavit is sub-
mitted in support of plaintiffs' application for an Order
to Show Cause, made this date.

2. These actions arise out of the collision on January
12, 1971 of the German vessel BRANDENBURG with the un-
buoyed and unmarked wreckage of the TEXACO CARIBBEAN
on the high seas, where that wreckage lay following a col-
lision on January 11, 1971 between the Peruvian vessel
PARACAS and the TEXACO CARIBBEAN.

3. Plaintiff Hapag Lloyd A.G. seeks damages from
defendant Texaco Panama, Inc. for the loss of the M/V
BRANDENBURG, and, as bailee, for loss of cargo laden aboard
her at the time of the collision. Plaintiffs Stork Amsterdam

*Affidavit in Support of Application for Order to Show
Cause with Stay*

N.V., et al., seek damages from defendant Texaco Panama, Inc. for the loss of their cargo laden aboard the M/V BRANDENBURG at the time of the collision.

4. Defendants Texaco, Inc. and Texaco Panama, Inc. have moved to dismiss all of the above-captioned consolidated cases (including twelve death and personal injury claims) on (among others) the ground of *forum non conveniens*. Following service of discovery demands by plaintiffs upon defendants, and defendants' objections thereto, the parties were heard as to the disputed discovery by Magistrate Jacobs, whose report issued on July 25, 1973. The report required defendants to respond to certain interrogatories and demands for production of documents, as modified by Magistrate Jacobs, and also required plaintiffs to file their answer to defendants' motions to dismiss within ten days after service of the required answers. Since no mention was made in the Magistrate's report of the procedure to be followed for plaintiffs to obtain depositions of defendants on the basis of the information to be disclosed in the forthcoming answers, counsel for all parties addressed letters to Judge Metzner urging their various positions on this subject; this Court's Memorandum Order of August 6, 1973, though noting receipt and review of the report and letters, confirmed the report as submitted without alteration, and without other comment on the deposition point. Copies of Magistrate Jacobs' report, counsels' three letter submissions, and this Court's Memorandum Order of August 6, 1973 are attached hereto as Exhibits A-1 through A-5, in chronological order.

5. Plaintiffs served defendants with a notice to admit on August 10, 1973, and with a supplemental notice of

*Affidavit in Support of Application for Order to Show
Cause with Stay*

deposition on August 17, 1973; defendants thereafter served an objection to plaintiffs' notice to admit, and addressed a letter to counsel for plaintiffs stating that they were treating plaintiffs' notices of depositions as null and void; counsel for death and personal injury plaintiffs responded by stating his contrary understanding of the terms of Magistrate Jacobs' report, and the Court's subsequent order. Copies of these documents are attached hereto as B-1 through B-5, respectively.

6. On October 5, 1973, defendants served their answers, a copy of which is attached hereto as Exhibit C. The inadequacy of the answers is explored in detail in the accompanying memorandum.

7. Plaintiffs on this motion ask that defendants be required to answer plaintiffs' notice to admit (Exhibit B-1 hereto), produce witnesses for deposition (pursuant to Exhibit B-2), and make full and sufficient answers to plaintiffs' interrogatories, as modified by the Court's memorandum order of August 6, 1973.

8. Defendants bring on this motion by order to show cause owing to the ten-day deadline contained in Magistrate Jacobs' report of July 25, 1973. Plaintiffs, if required to observe the deadline, would be forced into the position of having to submit their answers to defendants' motion for the drastic relief of dismissal, without having received the benefit of full written discovery on appropriate subjects from defendants bearing upon the motion, and without *any* opportunity to take the oral deposition of defendants on such topics *at all*. As the attached memorandum shows,

*Affidavit in Support of Application for Order to Show
Cause with Stay*

this would be clearly improper under the authorities in this District.

9. Plaintiffs accordingly move this Honorable Court to hand down its order as described in the order to show cause, and further respectfully request that the time for plaintiffs to file their papers in opposition to defendants' motion to dismiss the above-captioned cases be deferred until twelve days after the terms of that order have been fully and satisfactorily complied with by defendants.

10. No previous application has been made for this or similar relief, save as hereinabove described.

/s/ MACDONALD DEMING

Sworn to this 12th day
of October, 1973.

**Texaco Defendants' Affidavit in Opposition to
Plaintiffs' Order to Show Cause**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases), 72 Civ. 5009
and 5010, 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166
and 182.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALVIN L. STERN, being duly sworn, deposes and says:

1. I am a member of the firm of Poles, Tublin, Pates-
tides, and Stratakis, attorneys for defendants, Texaco Inc.
and Texaco Panama Inc., and am familiar with all the plead-
ings and proceedings heretofore had in this matter. This
affidavit is submitted in opposition to plaintiffs' motion,
brought on by Order to Show Cause dated October 12, 1973,
for an order (1) permitting plaintiffs to take the deposi-
tions of Mr. John I. Mingay and Mr. H. R. Christensen;
(2) requiring defendant, Texaco Panama Inc., to make
further answer to plaintiffs' revised interrogatories; (3)
overruling the objections of defendant, Texaco Panama Inc.,
to plaintiffs' Notice to Admit, dated August 10, 1973 and
requiring said defendant to answer same; and (4) allowing
plaintiffs further time within which to respond to defend-
ants' motion to dismiss.

*Texaco Defendants' Affidavit in Opposition to
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2. The factual background and details out of which the present litigation arises is fully covered in the report of Magistrate Jacobs dated July 25, 1973 (annexed hereto as Exhibit 1) and will not be repeated herein.

3. On July 25, following a full and complete hearing, Magistrate Jacobs issued his report to the Court concerning the discovery aspects of this matter. In that report, which was confirmed by order of the Court dated August 6, 1973, Magistrate Jacobs set out as a guideline the following:

“* * * liberal discovery, but not broad discovery on the merits, as to the location of any witnesses who took part or made any decisions as to locating or marking or buoying the wreckage.”

A copy of this Court's order confirming the award is annexed hereto as Exhibit 2.

4. Magistrate Jacobs' report, which was confirmed as submitted, following the receipt by the Court of several letters concerning the taking of depositions (part of the relief sought herein), and after full consideration of those letters and the file, completely disposed of the discovery issues now being presented for the second or third time to this Court on this motion.

5. Despite the fact that the Court had given consideration to all discovery aspects which might be permissible at this stage of this litigation, plaintiffs' attorneys took it upon themselves, after the decision of this Court had been

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rendered and in complete disregard of this Court's orders, to attempt to serve a Notice to Admit and several Notices of Examination Before Trial.

6. In taking this action, plaintiffs' attorney further confused the record in this matter, precipitated a further motion directed toward discovery and are further delaying the ultimate resolution of the matters.

7. A comparison of the Magistrate's report and the guidelines established therein with plaintiffs' Notice to Admit and request for further answers to interrogatories clearly establishes the inappropriateness of the relief being sought on this motion. It is obvious that plaintiffs are now attempting to obtain the same discovery that was previously denied by this Court by attempting to employ a different method of discovery.

8. The defendants herein have consistently supplied plaintiffs with all available information and answers insofar as they were required to do so under the Federal Rules of Civil Procedure and this Court's orders. Despite this fact, plaintiffs continue to harass the defendants and waste the time of this Court by indulging in "fishing expeditions" by seeking information that is irrelevant and concerns events that occurred some two or three years prior to the subject casualty and some five years prior to the commencement of this litigation.

9. The sole issue before the Court is whether or not it would be more convenient to hold the trial of this matter

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in this Court or in England. The answer to that question depends to a large extent on the *present* location of the witnesses and documents necessary to try the matter. The location of defendants' offices or potential witnesses some five years ago and some two and three years prior to the casualty which is the subject of this litigation is totally irrelevant.

10. Plaintiffs in their Notice to Admit have requested that defendant, TEXPAN, admit or deny the existence or non-existence of certain facts during the month of December, 1967. The collision which is the subject of this litigation occurred in January, 1971 (some three years later). The present litigation was commenced in December, 1972 and January, 1973 (some five years later). Clearly the matters which defendant is asked to admit or deny has no possible relevance to the issues now before the Court and can in no way shed any light on the *present* location of the witnesses and documents necessary to the trial of this matter.

11. Even if defendant had an office in New York at the present time, which it does not, answers to plaintiffs' Notice to Admit would be inappropriate in view of the guidelines established by this Court in Magistrate Jacobs' report and the irrelevance of the matters on which discovery is sought. (See also *Fitzgerald v. Westland Marine Corp.*, 369 F. 2d 499 [2 Cir. 1966] and *Domingo v. States Marine Lines*, 340 F. Supp. 811 [S.D. N.Y. 1972]).

12. Plaintiffs however have not stopped with their Notice to Admit. In addition, they are attempting to seek the same information by means of compelling defendant to

*Texaco Defendants' Affidavit in Opposition to
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furnish further answers to their interrogatories. Specifically, plaintiffs have requested defendant to identify the location of its offices and the names of those persons in charge thereof during the periods November 1, 1967 through March 31, 1968 and November 1, 1970 through March 31, 1971. This Court, however, has already determined that such information is irrelevant and revised the original wording of plaintiffs' interrogatories when it directed that they be answered with the Court's "guideline" in mind. That guideline, quoted herein on page 2, allows plaintiffs liberal discovery as to the *present* location of witnesses etc. Personnel located in an office some three years prior to the subject casualty certainly do not fall into the category of persons contemplated by the Court's guidelines.

13. Keeping all the above in mind, defendant answered plaintiffs' interrogatories as revised by this Court and plaintiff is not now entitled to any further answer. Any further answer would in no way assist plaintiffs in establishing the *present* location of any witnesses or documents which is the only permissible area of discovery at this time as set out by order of the Court and the report of Magistrate Jacobs.

14. As was stated by this Court in *Blumenthal v. Lukacs*, 2 F.R.D. 427 (S.D.N.Y. 1942), at page 428:

"After examining the affidavits submitted, I am of the opinion that no connection has been shown between the matters sought to be elicited from the plaintiff and the issue in the case. At best, it is highly conjectural and it seems that the defendant hopes that answers to these questions may reveal

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information beneficial to the defendant. The new Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, have liberalized the scope of examination before trial. Nevertheless, relevancy to the issue is still the test, and in my opinion, the defendant has failed to meet it."

15. In summary, it is clear that the information sought by plaintiff by means of requests for admissions and further answers to interrogatories is irrelevant to the issues now before this court, and defendants' objections thereto should be sustained. In the case of *Burns v. Phillips*, 50 F.R.D. 187 (N.D. Ga. 1970), defendant sought discovery on matters which occurred prior to the accident there sued upon. The Court, in sustaining plaintiffs' objections stated at page 188:

"The objected-to requests all relate to persons not involved in this litigation and to events which transpired some two years before the accident in question occurred. Defendants contend that the admissions would be admissible for purposes of impeaching Plaintiff Rebel Burns' deposition testimony and to rebut deposition testimony which has been obtained from certain other witnesses.

[4, 5] The purpose of the rule pertaining to requests for admissions is to expedite trial by removing essentially undisputed issues, thereby avoiding the time, trouble and expense which otherwise would be required to prove those issues. *Moosman v. Joseph P. Blitz, Inc.*, 358 F. 2d 686 (2d Cir. 1966); *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910 (2d Cir. 1959). This purpose is best served by ad-

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hering to the rule's requirement that the requested admissions by *relevant* to the issues in the case. *If usefulness for purposes of impeachment were accepted as the criterion of relevancy, the relevancy test would for all practical purposes be worthless.*" [Emphasis supplied]

16. In addition to attempting to obtain discovery on matters which are clearly irrelevant, plaintiffs have served several notices of examination before trial on the defendants herein. Not only is the scope of the depositions, as specified in Plaintiffs' Supplemental Notice, outside the guidelines established by this Court as permissible areas of discovery, but this Court has already denied plaintiffs' request to take these depositions and the additional discovery herein sought.

17. As previously stated, Magistrate Jacobs issued his report on July 25, 1973. On July 26, 1973 and again on July 31, 1973 by letters addressed to the Court (Plaintiffs' Exhibit A-2 and A-4), plaintiffs specifically requested an opportunity to take depositions and stated that it could not do so within the 10 days specified in Magistrate Jacobs' report. Subsequently, on August 6, 1973 this Court, having reviewed the Magistrate's report and the *above-mentioned* letters confirmed that report as submitted. The Court's "memorandum endorsed" read as follows:

"August 6, 1973 the Court having read the report of Magistrate Jacobs, *the letters submitted by counsel in connection with that report*, and reviewing the file, confirms the report as submitted. So Ordered." [Emphasis supplied]

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18. Clearly, based on the above described sequence of events and the language used by the Court in confirming the Magistrate's Report, plaintiffs' request was denied. Had the Court determined that such depositions were required, it would have so provided in its order and would have given plaintiffs the additional time requested.

19. In any event, it should be noted that Mr. John I. Mingay is no longer a director, officer or employee of either TEXPAN or TEXACO, and his testimony would not, therefore, be binding on the defendants herein (See *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169 [S.D. N.Y. 1956]). Mr. Mingay was not a witness to any of the events which are the subject of this litigation and does not have any personal knowledge concerning said events. Furthermore, Mr. Mingay lives outside of the jurisdiction of this Court and in fact the United States. The very purpose of defendants' *forum non conveniens* motion would be defeated if they were to be required to bring in people from outside the United States.

20. With respect to Mr. Christensen, it should be noted that he also is neither an officer or director of either defendant herein, although he is an employee of defendant, TEXACO. Therefore, as is the case with Mr. Mingay, his testimony would not be binding on either of the defendants herein. Furthermore, he was not a witness to the events which are the subject of this litigation nor does he have any personal knowledge concerning any of the events.

21. Nevertheless, plaintiffs claim that it requires these depositions to "explore this information by deposition * * *, so that they will not be compelled to resist defendants' mo-

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tion to dismiss their cases *solely on the basis of defendants' carefully drawn affidavits.*" [Emphasis supplied] Plaintiffs' attorneys have apparently overlooked the fact that they have already been given full and complete discovery as per the order of this Court dated August 6, 1973 and the report of Magistrate Jacobs dated July 25, 1973. Surely counsel does not think that the Court will ignore the defendants' responses to plaintiffs' questions and request and decide the motion to dismiss solely on defendants' sworn affidavits.

22. In any event, the purpose of discovery is to elicit information which is relevant to the issues and will aid a party in either proving its claim or sustaining a defense. Plaintiffs are not entitled to take depositions in order to "probe" the defendants' responses to prior request. As broad and as liberal as the rules on discovery may be, relevancy to the issues before the Court is still the test. (See *McCarthy v. Benton*, 13 F.R.D. 454 [Dist. Co. 1952] and *Blumenthal v. Lukacs*, *supra*).

23. In summary, plaintiffs' motion should be denied because:

(1) The information sought by means of the Notice to Admit and request for further answers to interrogatories is totally irrelevant to the issues now before this Court.

(2) The discovery sought is in blatant disregard of Magistrate Jacobs' report dated July 25, 1973 and this Court's order dated August 6, 1973, both of which denied plaintiff such discovery.

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(3) Neither Mr. Mingay nor Mr. Christensen are officers, directors or managing agents of either of the defendants herein.

(4) Both Mr. Mingay and Mr. Christensen reside outside the jurisdiction of this Court. In fact, Mr. Mingay resides outside of the United States.

(5) It would defeat the very purpose of defendants' *forum non conveniens* motion to require it to produce persons outside of the United States for the taking of depositions.

(6) In any event the scope of the depositions as outlined in plaintiffs' supplemental Notice of Deposition is beyond the bounds set by this Court in its guidelines for discovery and clearly covers matters which, while they might be revelant to the question of jurisdiction, are totally irrelevant on the issue of *forum non conveniens*.

Sworn to before me this
18th day of October, 1973.

JOHN J. DEVINE, JR.
Notary Public

**Magistrate Jacobs' Report of 24 Oct 73 Recommending
Further Limitation of Plaintiffs' Discovery**

72 Civ. 5008, and Consolidated Cases 72 Civ. 5009 and
5010, and 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166
and 182

[SAME TITLE]

Plaintiffs' motion by order to show cause dated October 12, 1973 for an order (1) requiring replies to a notice for admissions dated August 10, 1973, (2) requiring further answers to interrogatories approved by the order dated August 6, 1973 and (3) allowing plaintiffs to depose certain officers of Texaco, Inc. and Texpan was referred to the undersigned to hear and report. A hearing was held on October 19, 1973.

The actions arise out of the collision on January 12, 1971 of the German Vessel Brandenburg with the wreckage of the Texaco Caribbean in the English Channel following a collision on January 11, 1971 between the Peruvian vessel Paracas and the Texaco Caribbean. The present consolidated suits were brought to recover damages resulting to the families (none of whom reside in the United States) of 12 deceased crew members of the Brandenburg and damages resulting from the loss of the Brandenburg and her cargo. Plaintiffs state that "the suits are based upon the failure of the defendants to locate, mark or buoy the wreckage of the Texaco Caribbean as required by law" (Aff. Deming 2/7/73 par. 3). Plaintiffs have stated that "Discovery is needed to learn the geographical location of vital evidence and witnesses. To identify these it is necessary to first identify the central merits and issues and then ask who has knowledge of them and where they live and work and where relevant documents on these issues are" (Aff. Deming 6/7/73, par. 5).

*Magistrate Jacobs' Report of 24 Oct 73 Recommending
Further Limitation of Plaintiffs' Discovery*

By motion dated March 2, 1973 defendants moved to dismiss the action on the ground of *forum non conveniens*. The facts and circumstances upon which defendants rely are set forth at length in the report of the undersigned dated July 25, 1973 (Ex. A-1 to Aff. Deming, October 12, 1973, pp. 2 et seq.) confirmed by order of the Court dated August 6, 1973. In support of the basic motion defendants have stressed that there is no question as to (1) the occurrence of the collision in the English Channel; (2) Trinity House, engaged by Tot to locate and mark the wreck and to warn other vessels of its presence, is located in England together with its personnel and records; (3) the crews of the three vessels involved, and the families of the crew members on behalf of whom actions in this Court were brought, are foreign nationals none of whom reside in the United States; and (4) the absence of certain indispensable parties before this Court, apparently being Trinity House, an English Corporation, and the owner of the Paracas, who are subject to cross claims by defendants.

The order of the Court dated August 6, 1973 afforded plaintiffs extensive discovery as to interrogatories and documents. Defendants urge that the prior order limited discovery and no further discovery should be allowed.

I.

In the notice to admit (Ex. B-1 to Deming Aff.) plaintiffs seek admissions as to whether (1) Texpan had an office and place of business in New York in December 1967; (2) Texpan in December 1967 caused letters to be sent on stationery bearing a certain letterhead; and (3) whether in December 1967 Texpan addressed letters on this stationery which included certain particular language. Plaintiffs

*Magistrate Jacobs' Report of 24 Oct 73 Recommending
Further Limitation of Plaintiffs' Discovery*

apparently contend that all important functions were performed in New York in December 1967 and that this continued to the time of the casualty (January 1971). While the significance of this on the basic motion is not apparent, the requests permit a simple yes or no answer and should be allowed.

II.

Plaintiff seeks a further answer to Interrogatory 1 which sought details as to each office of Texpan, the representatives in charge, and the functions performed during the period from "November 1, 1967 through March 31, 1968" and also "November 1, 1970 through March 31, 1971".

The answer furnished details as to the time of the casualty (January 12, 1971) and the time of the answer (October 5, 1973). Again plaintiffs seek the information as of 1967 and the answer should set forth the requested information for the *two* stated periods.

III.

The main thrust of the present motion is to depose orally an officer of Texaco, Inc. and also Texpan. At the time of the hearings (May 22 and June 29) on the discovery motions considered in the report dated July 25, 1973 plaintiffs had not served any notices. They state that at the hearings they mentioned their intention to take such depositions but the undersigned has no recollection of their so stating, believed that discovery by interrogatories and documents was all that they sought, and the report was silent as to any oral depositions. After the report plaintiffs by letters to the Court dated July 26 and 27, 1973 strongly urged that they should be allowed to take oral depositions. The order of the Court states that "The Court having read the report of Magistrate Jacobs, the letters submitted by counsel in con-

*Magistrate Jacobs' Report of 24 Oct 73 Recommending
Further Limitation of Plaintiffs' Discovery*

nection with that report, and reviewed the file, confirms the report as submitted". Thus, the Court clearly intended to limit discovery to that expressly set forth in the report.

Plaintiffs now seek to depose John I. Mingay and H.R. Cristensen who are stated, in the answer to Interrogatory 8 (Ex. C), as having received "communications of an informational nature" as to the location, marking or removal of the wreck. Mr. Mingay was Chairman of the Board of Texpan at the time of the wreck but is no longer a director, officer or employee. Mr. Cristensen was and is an employee of Texpan. Plaintiffs seek to probe such answers. They would question the witnesses as to (1) the present and 1971 location of witnesses and evidence and (2) whether the important functions at the time of the wreck were conducted from New York or England. The undersigned is not persuaded that there is any real possibility that any oral depositions will yield anything of significance, beyond what is already known to plaintiffs, bearing on the basic question of *forum non conveniens* (the present geographical location of witnesses and evidence).

Accordingly, it is recommended that (1) defendants respond to plaintiffs' notice to admit dated August 10, 1973; (2) defendant Texpan further respond to Interrogatory 1; (3) plaintiffs' motion to depose John I. Mingay and H.R. Cristensen be denied; and (4) plaintiffs file any papers in opposition to the basic motion within 12 days after the replies to the notice to admit and the further answers to the interrogatories.

Dated: New York, New York
October 24, 1973

Respectfully submitted,

MARTIN D. JACOBS
United States Magistrate

Copies of this report have been mailed to counsel.

**Plaintiffs' Joint Letter of 26 Oct 1973 to Metzner, J.
(with Copy to Magistrate Jacobs) Objecting to the
Magistrate's Report of 24 Oct 1973**

October 26, 1973

Honorable Charles M. Metzner
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N. Y. 10007

Thomas I. Fitzgerald, as Public Administrator
v. Texaco, Inc. and Texaco Panama, Inc.
72 Civ. 5008 and consolidated cases
72 Civ. 5009-10, 73 Civ. 92-99, 117, 162 and 182
Poles, Tublin File #12,515 MJT/JJD
Our Files Nos. 4246-1, -1A

Your Honor:

Counsel for all plaintiffs submit that part III and recommendation (3) of Magistrate Jacobs' report of October 24, 1973, if approved, would not only invite reversal on the law, but would also prevent even a minimally fair exercise by plaintiffs of their rights to discover facts necessary to oppose defendants' motion for the drastic relief of dismissal.

With regard to the facts, defendants Texaco and Texaco Panama, Inc. have moved to dismiss all these cases on the ground (among others) of *forum non conveniens*. Plaintiffs' several claims against defendants are advanced on the ground (among others) of defendants' failure properly to

*Plaintiffs' Joint Letter of 26 Oct 1973 to Metzner, J.
(with Copy to Magistrate Jacobs) Objecting to the
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locate, mark or buoy the wreckage of the m/v Texaco Caribbean upon which the m/v Brandenburg ran and was destroyed, causing the deaths, and loss of ship and cargo for which plaintiffs variously sue.

One issue admitted by all parties and the Magistrate as relevant to the *forum non conveniens* ground is the geographical location of witnesses and evidence as to defendants' activities (or lack thereof) with regard to locating, marking and buoying the wreckage. Defendants have admitted that the Chairman of the Board of Directors of Texaco Panama, Inc., and another employee of defendants, received unspecified communications in the United States with regard to the casualty. Further, plaintiffs will shortly receive admissions from defendants that, in December of 1967, defendant Texaco Panama, Inc. had an office and place of business in New York from which the Chairman of its Board of Directors ordered the affairs of the entire Texpan time-chartered fleet, specifically requiring at that time that *important matters with regard to fleet operation were to be dealt with in New York.**

Under these circumstances plaintiffs should be entitled, under the liberal Federal discovery rules, at least to find out by deposition from defendants: how long the affairs of Texaco and Texaco Panama were directed from New York after December, 1967; whether the affairs of Texaco Panama, Inc., a wholly-owned subsidiary of Texaco, Inc. (whose offices presently occupy several floors at 135 East 42nd Street in Manhattan) continued *in fact* to be controlled from Texaco's offices in New York at the time of the cas-

* See plaintiffs' Notice to Admit of August 10, 1972, attached as Exhibit B-1 to Order to Show Cause with Stay signed by Your Honor on October 12, 1973.

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(with Copy to Magistrate Jacobs) Objecting to the
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uality, under whatever corporate name; and what, if any, control or supervision was exerted by defendants in New York, or in countries other than England or Monaco, with regard to locating, marking or buoying the wreck of the m/v Texaco Caribbean. Such inquiries *plainly* might lead to the discovery of admissible evidence on defendants' dismissal motion, and are proper discovery under Rule 26(b)(1). Depositions will provide plaintiffs their only unrehearsed chance to find out what non-European evidence and witnesses exist on these subjects. Even if minimal, as defendants suggest, *plaintiffs nonetheless should be given the opportunity to depose defendants on these points.*

Since the death suits are against Texaco, Inc. (an American corporation having its principal place of business in New York) and against Texaco Panama, Inc., a wholly-owned subsidiary of Texaco, dismissal would create this anomaly: suits against a New York based, American owned corporation, based on American law (Death of the High Seas Act, 46 U.S.C. 761, *et seq.* and the United States General Maritime Law) would be thrown into an English court. That forum would have the right to apply English law to the exclusion of American law, all without plaintiffs ever being given the opportunity to demonstrate the matter of proper forum on the crucial point—the question of *control* of defendant Texaco's vessels (Texaco is the charterer of its subsidiary's vessel, for tax benefits).

The question of control over movement of vessels is the foundation of numerous decisions by various American Courts on this subject. The report of Magistrate Jacobs does not in any way mention this factor. Magistrate Jacobs speaks only of the deposition of two persons on issues not involving corporate relationships between defendants, or

*Plaintiffs' Joint Letter of 26 Oct 1973 to Metzner, J.
(with Copy to Magistrate Jacobs) Objecting to the
Magistrate's Report of 24 Oct 1973*

of general control over movement of vessels. The supplemental notice of deposition (annexed hereto) and discussed at the hearing before Magistrate Jacobs) raised this point, but is totally ignored in his report; yet it is pivotal in plaintiffs' request for relief. We believe that we are entitled to have reasonable, full answers to questions concerning control and relationship of the parties to determine if there is any reason to dismiss a suit against this New York based American corporation.

Magistrate Jacobs seems to have based his report wholly on the question of geographical location of witnesses and evidence. The issue of Justice to the parties and the effective right to start suit in the proper forum, based both on the defendant's location and the applicable law, is not adverted to at all.

We believe that the Court should know as early as possible that England has no contingency fee system. A directive by this Court compelling suit to be brought in England would in effect destroy the right of twelve widows and their children to bring suit against this New York based corporation, since the lack of funds to pay legal fees in advance would effectively preclude legal action.

With regard to the law, plaintiffs' Memorandum in Support of Order to Show Cause lists seven recent Southern District cases which all hold that plaintiffs, faced with motions to dismiss their cases, are entitled to depositions of defendants at least with regard to issues bearing on the dismissal motions. Neither counsel for defendants nor Magistrate Jacobs cite any cases to the contrary, nor any

*Plaintiffs' Joint Letter of 26 Oct 1973 to Metzner, J.
(with Copy to Magistrate Jacobs) Objecting to the
Magistrate's Report of 24 Oct 1973*

reason why these precedents should not be observed. Judge Edelstein has succinctly stated the underlying rationale of these cases, when he said that trial of an issue which may result in dismissal "by affidavits is unsatisfactory and . . . plaintiffs should have an opportunity to prove the jurisdictional fact by discovery proceedings," specifically including depositions. *Blair Holding Corp., v. Rubenstein*, 20 F.R. Serv. 427 (S.D.N.Y. 1954) [26 A.162, case 1]. Unless plaintiffs are allowed oral discovery, they will be forced to base their papers in opposition to dismissal only upon defendants' affidavits, and their counsel's carefully prepared answers to interrogatories.

Indeed, in a case where the Court below dismissed a seaman plaintiff's personal injury libel solely on the basis of affidavits submitted by the defendant, Judge Medina reversed and remanded, stating "a hearing is necessary to determine the validity of the service. This hearing should be held before the District Court and not before any commissioner." *Monteiro v. San Nicolas, S.A.*, 254 F. 2d 514, 517 (2 Cir. 1958).

Denial of plaintiffs' right to depose defendants, at least with regard to issues relevant to their motion to dismiss these actions, is plainly wrong on the facts and plainly contrary to the authorities in this District. Why must plaintiffs, who through their discovery to date now have a hold on some strings which plainly might lead to important and admissible evidence, be prevented from following these strings to their end by the most efficacious means?

*Plaintiffs' Joint Letter of 26 Oct 1973 to Metzner, J.
(with Copy to Magistrate Jacobs) Objecting to the
Magistrate's Report of 24 Oct 1973*

We most earnestly request that Your Honor's eventual order uphold plaintiffs' notice of deposition of August 17, 1973,* so that plaintiffs may have a minimally fair opportunity to oppose defendants' motion for the drastic relief of dismissal.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By

MacDonald Deming
Attorneys for Plaintiffs Hapag-Lloyd
Stork Amsterdam N.V. et al.

FUCHSBERG & FUCHSBERG

By

Harvey Goldstein
Attorneys for Death Claimants

MD:je

CC: Martin D. Jacobs, United States Magistrate
United States District Court
Foley Square, New York, N. Y. 10007**

* Exhibit B-2 to Order to Show Cause with Stay signed by Your Honor on October 12, 1973.

** Also to: Poles, Tublin, Patestides & Stratakis
37 Wall Street
New York, N. Y. 10005 Attn: Alvin Stern, Esq.

**Texaco Defendants' Letter of 31 Oct 1973 to Metzner, J.
(With Copy to Magistrate Jacobs) in Reply**

letterhead of

POLES, TUBLIN, PATESTIDES & STRATAKIS

October 31, 1973

Honorable Charles M. Metzner
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Fitzgerald v. Texaco Inc.
and Texaco Panama Inc.
72 Civ. 5008, *et seq.*
Our File No. 12,515 MJT/JJD

Honorable Sir:

We refer to the letter dated October 26, 1973 submitted jointly by attorneys for plaintiffs in the captioned actions and to the report of Magistrate Jacobs dated October 24, 1973 concerning which we wish to make the following comments:

(A) With respect to Parts (1) and (2) of the Magistrate's report, we respectfully submit that the information sought by plaintiffs' attorneys is completely irrelevant on the issue of *forum nonconveniens* in view of the time periods involved. The location of defendants' offices and employees some five years ago and some two and three years prior to the casualty which is the subject of this litigation is totally irrelevant. It furthermore has nothing to do with the *present* locations of witnesses and documents

*Texaco Defendants' Letter of 31 Oct 1973 to Metzner, J.
(With Copy to Magistrate Jacobs) in Reply*

necessary to try this matter. The Magistrate recognized this in his report and stated that "the significance of this on the basic motion is not apparent;" he nevertheless permitted plaintiffs the requested discovery. Plaintiffs should be denied the requested discovery on the grounds of the irrelevance and immateriality of the information sought.

(B) The Magistrate's recommendation in Part (3) is in full accord with the law on the issue of *forum non conveniens* and with this Court's prior determination of the "deposition issue" in its order dated August 6, 1973. See page 4, Magistrate Jacobs' report dated October 24, 1973, where he states:

"After the report plaintiffs by letters to the Court dated July 26, and 27, 1973 strongly urged that they should be allowed to take oral depositions. The order of the Court states that 'That Court having read the report of Magistrate Jacobs, the letters submitted by counsel in connection with that report, and reviewed the file, confirms the report as submitted'. Thus, the Court clearly intended to limit discovery to that expressly set forth in the report."

It should be noted that despite the fact that this Court has already given full consideration to all discovery aspects which might be permissible at this stage of this litigation, plaintiffs' attorneys took it upon themselves, *after* the decision of this Court had been rendered and in complete disregard of this Court's Order, to attempt to serve a Notice to Admit and several Notices of Examination before Trial. They now seek to have these actions sanctioned by the very Court whose Orders they disregarded. In taking these actions, plaintiffs' attorneys have

*Texaco Defendants' Letter of 31 Oct 1973 to Metzner, J.
(With Copy to Magistrate Jacobs) in Reply*

further confused the record in this matter precipitated a further motion directed toward discovery and are further delaying the ultimate resolution of the matters.

In addition, Plaintiffs' counsel are once again attempting to cloud the issue by referring to matters having to do solely with the question of jurisdiction.

Magistrate Jacobs quite correctly states that the sole issue presently before the Court is:

"the present geographical location of witnesses and evidence." (See page 4 of His report).

In this regard, it should be noted that Mr. Mingay, one of those whom plaintiffs seek to depose, is no longer an officer, director, managing agent or employee of either defendant in the captioned matter. Mr. Mingay could not give any testimony relevant to the issues now before this Court nor would his testimony be binding on any of the defendants herein. In addition, it should be noted that he is no longer a resident of the United States and could only appear for his deposition voluntarily. In this connection, it would defeat the very purpose of a motion based on *forum non conveniens* to compel a defendant to produce persons living in foreign countries for the taking of a deposition. While such a course might be proper on certain issues concerned with *in personam* jurisdiction over a corporate defendant, it is not so here.

With respect to Mr. Christensen, he is merely an employee of Texaco Inc. As in the case of Mr. Mingay, Mr. Christensen's testimony would not be binding on either of the defendants herein. Furthermore, it would not serve any useful purpose. The defendants have already fully disclosed the location of witnesses in this matter.

*Texaco Defendants' Letter of 31 Oct 1973 to Metzner, J.
(With Copy to Magistrate Jacobs) in Reply*

(C) Plaintiffs' attorneys allege that an anomaly would result if suits against a New York based, American owned corporation, are sent to an English Court. Plaintiffs' attorneys have apparently failed to read the case of *Domingo v. States Marine Lines*, 340 F. Supp. 811, (S.D.N.Y. 1972), cited at page 3 of Magistrate Jacobs' report dated July 25, 1973 and confirmed by order of this Court dated August 6, 1973.

(D) It is submitted that the question of "control over movement of vessels" is irrelevant under the facts presently before this Court as are all questions concerned with the defendants' corporate structure. Defendants do not and have not disputed the question of *in personam* jurisdiction. Defendants' motion is based not only on the premise that it would be more convenient for *all* concerned to hold the trial of this matter in England rather than the United States, but that they would be severely prejudiced if trial was not held in England since certain indispensable parties are not present in this jurisdiction but are present in the proposed forum.

(E) Throughout the entire history of this matter, plaintiffs have failed to come forward with one single reason why it would be convenient to retain this litigation in this Court. Plaintiffs are of the opinion that because England does not have a contingency fee arrangement and the United States does that this is a compelling reason for retaining the action here. Such an argument or even allusion to such a fact is absurd and is based more on the concern of losing a fee by attorneys retained in the United States than anything else! The question of how or when plaintiffs will pay their attorneys is so totally irrelevant on the judicial issue of *forum non conveniens* that nothing further need be said.

*Texaco Defendants' Letter of 31 Oct 1973 to Metzner, J.
(With Copy to Magistrate Jacobs) in Reply*

In summary, it is clear that:

(1) The information sought by way of Notice to Admit is irrelevant and should be denied.

(2) The information sought by way of additional answers to interrogatory one is also irrelevant and should be denied.

(3) Plaintiffs should not be allowed to take the depositions of:

(a) Mr. Mingay because he is no longer an officer, director or employee of either defendant; he resides outside of the United States; his testimony would not be binding on either defendant; the vast majority of the points upon which plaintiffs intend to depose him are irrelevant to the issue of *forum non conveniens*.

(b) Mr. Christensen, although he is an employee of Texaco Inc., should not be deposed for substantially the same reasons stated above with respect to Mr. Mingay.

It is, therefore, respectfully requested that (a) Recommendations (1) and (2) of Magistrate Jacobs' report be disapproved; (b) Recommendation (3) be approved; and (c) that plaintiffs be directed to file their answering briefs on defendants' motion to dismiss within 12 days of service of a copy of the Court's Order herein.

Respectfully yours,

POLES, TUBLIN, PATESTIDES & STRATAKIS

/s/ JOHN J. DEVINE, JR.

John J. Devine, Jr.

JJD/mab

cc: Martin D. Jacobs, U.S. Magistrate

cc: Messrs. Haight, Gardner, Poor & Havens

cc: Messrs. Fuchsberg & Fuchsberg

**Court's Memorandum Endorsement of 15 Nov 73 on
Vessel & Cargo's Order to Show Cause with Stay of 12
Oct 73**

Thomas I. Fitzgerald, etc., et al., v. Texaco, Inc.
and Texaco Panama, Inc., 72 Civ. 5008, et seq.

This motion returnable October 19, 1973, was referred to Magistrate Jacobs to hear and report. This was done because the magistrate had heard prior motions in this litigation and there was still pending before him a motion to dismiss for *forum non conveniens*. The issues are fully discussed in his reports dated July 25, 1973 and October 24, 1973.

Clearly, plaintiffs are entitled to a further answer to Interrogatory No. 1, pursuant to the order of August 6, 1973. On the other hand, I find plaintiffs' request for additional discovery through a notice to admit and a notice to take depositions is clearly outside the scope of the order of August 6, 1973. There is nothing in the papers presented on this motion that calls for a modification of that order.

Defendants shall furnish the additional answer to Interrogatory No. 1 as set forth on page 3 of the report of Magistrate Jacobs dated October 24, 1973. This answer shall be filed on or before November 26, 1973. Plaintiffs shall file with Magistrate Jacobs any papers in opposition to the motion to dismiss on or before December 10, 1973.

So ordered.

Dated: New York, N. Y.
November 15, 1973

/s/ CHARLES M. METZNER
U. S. D. J.

**Texaco Defendants' Further Answers to Plaintiffs'
Interrogatory No. 1**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Texaco Panama Inc., by its attorneys, Poles, Tublin, Patestides and Stratakis, further answering plaintiffs' interrogatory numbered 1 states upon information and belief as follows:

Question

1. Please identify each office or place of business of Texaco Panama Inc. (hereinafter referred to as "Texpan"), during the period from November 1, 1967 through March 31, 1968, and during the period from November 1, 1970 through March 31, 1971, stating as to each its full address, the full name and residence address then and now of Texpan's representative in overall charge, and the corporate functions there performed. Please indicate which of the offices so identified is Texpan's main office, and which is its registered office.

Answer

During the period from November 1, 1967 through March 31, 1968 and during the period from November 1, 1970 through March 31, 1971, Texaco Panama Inc. had only one office located at Via Transmica Panama, Republic of Panama. Texaco Panama Inc. is a company engaged in the marketing of petroleum products in the Republic of

*Texaco Defendants' Further Answers to Plaintiffs'
Interrogatory No. 1*

Panama and in worldwide marine transportation. The company's marketing operations include ownership of facilities in Panama City and Colon and its products are marketed by 31 service stations throughout the Republic of Panama. Marine Transportation operations include ownership of vessels engaged in the worldwide transportation of petroleum products.

During the period November 1, 1967 through March 31, 1968 the person in charge of said office was Mr. R. W. Chandler.

<i>Prior Address</i>	<i>Present Address</i>
Panama, R. P.	Edificio Villalata
Exact street address	6th Floor
presently unknown	Ave. Manuel Jose Hurtado
	La Cresta, Panama, R. P.

During the period November 1, 1970 through March 31, 1971 the person in charge of said office was Mr. Michael I. Malcolmson.

<i>Prior Address</i>	<i>Present Address</i>
Calle 6A Final	Rua Getulio Dos Nedes 26
Coco Del Mar	Rio de Janeiro
Panama, R. P.	Guanabara, Brazil

Dated: New York, New York
November 26, 1973

POLES, TUBLIN, PATESTIDES & STRATAKIS

By: ALVIN L. STERN
Member of the Firm
Attorneys for Defendant,
Texaco Panama Inc.
37 Wall Street
New York, New York 10005
(212) 944-0580

250a

*Texaco Defendants' Further Answers to Plaintiffs'
Interrogatory No. 1*

To:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs, Hapag
Lloyd, Stork Amsterdam, et al
One State Street Plaza
New York, New York 10004

FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs,
Thomas I. Fitzgerald, etc.
250 Broadway
New York, New York

*Texaco Defendants' Further Answers to Plaintiffs'
Interrogatory No. 1*

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN J. DEVINE, being duly sworn, deposes and says:

1. I am an attorney at law, associated with the firm of Poles, Tublin, Patestides and Stratakis, attorneys for the defendant, Texaco Panama Inc., herein.

2. I have read the foregoing Further Answer to Interrogatory numbered 1 and know the contents thereof and that the same is true to the best of my knowledge or information and belief.

3. The sources of my information and the grounds of my belief are statements, records, documents and information supplied to me by agents and employees of the defendant.

4. The reason this verification is made by deponent and not by said defendant is that said defendant is a foreign corporation.

/s/ JOHN J. DEVINE, JR.
John J. Devine, Jr.

(Sworn to before me this 26th day of November, 1973.)
BEATRIX DES MARETS DODD

Notary Public

BEATRIX DES MARETS DODD
Notary Public, State of New York
No. 24-6051045
Qualified in Kings County
Certificate filed with New York Co. Clerk
Commission Expires March 30, 1974

**Vessel and Cargo's Letter to Metzner, J. of 29 Nov 1973
(with Copy to Magistrate Jacobs) Inquiring as to
Interpretation of the Court's Order of 15 Nov 1973**

November 29, 1973

By Hand

Honorable Charles M. Metzner
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N. Y. 10007

Thomas I. Fitzgerald, as Public Administrator
v. Texaco, Inc. and Texaco Panama, Inc.
72 Civ. 5008 and Consolidated Cases
72 Civ. 5009-10, 73 Civ. 92-99, 117
162 and 182
Poles, Tublin File #12,515 MJT/JJD
Our Files #4246-1 and 1A

Your Honor:

We write with reference to Your Honor's order of November 15, 1973, to inquire whether it is intended to prevent plaintiffs from obtaining deposition discovery from third parties on *forum non conveniens* issues, prior to submission of papers in opposition to defendants' motion to dismiss these actions. Our purpose in informally requesting this guidance is to avoid needlessly consuming the Court's and counsel's time in further motion practice, should Your Honor's intent have been to impose such a limitation.

*Vessel and Cargo's Letter to Metzner, J. of 29 Nov 1973
(with Copy to Magistrate Jacobs) Inquiring as to
Interpretation of the Court's Order of 15 Nov 1973*

Your Honor's initial order of August 6, 1973, disposed of two motions: plaintiffs' motion for an order requiring defendants to answer written interrogatories and produce documents, and defendants' motion for a protective order with respect to that discovery. No depositions had at that time been noticed by any party. Magistrate Jacobs' report of July 25, 1973, required defendants to respond to certain written interrogatories and one request for production of documents, and recommended that plaintiffs be required to serve their papers in opposition to defendants' underlying dismissal motion ten days after receipt of those answers. There is no mention of deposition in Magistrate Jacobs' report.

Having expected, under FRCP Rule 26(d) to notice depositions based upon defendants' answers to written discovery, plaintiffs by letter requested that Your Honor's eventual order allow plaintiffs more time to take depositions than was provided by Magistrate Jacobs' proposed deadline. However, Your Honor's order of August 6, 1973 (though noting receipt of counsel's letter submissions on the point) confirmed Magistrate Jacobs' report as submitted, without mentioning depositions.

Faced with this short deadline, plaintiffs immediately noticed the depositions of defendants. Following receipt of notice from defendants that they were treating the notices as null and void, plaintiffs moved to compel defendants to produce the witnesses noticed. Your Honor's resulting order of November 15th states that plaintiffs' request for discovery by deposition "... is clearly outside the scope of the order of August 6, 1973."

*Vessel and Cargo's Letter to Metzner, J. of 29 Nov 1973
(with Copy to Magistrate Jacobs) Inquiring as to
Interpretation of the Court's Order of 15 Nov 1973*

We write to inquire whether Your Honor intended that any depositions noticed by plaintiffs of third parties, in order to defend against the underlying dismissal motion, should be considered barred as "clearly outside the scope of the order of August 6, 1973", since neither that order nor the report it adopted mention depositions, and since none had at the time of that order even been noticed.

Since plaintiffs are required to file their papers in opposition to the dismissal motion on or before December 10th of this year, we would be grateful for Your Honor's early indication of his intent.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By MACDONALD DEMING
MacDonald Deming

MD:bjj

cc: Poles, Tublin, Patestides & Stratakis
Martin D. Jacobs, United States Magistrate
Harvey Goldstein, Esq.

**Vessel and Cargo's Letter to Metzner, J. (with Copy to
Magistrate Jacobs) of 3 Dec 1973 Confirming the
Court's Telephoned Advice that Plaintiffs were
Barred from Taking any Oral Depositions**

December 3, 1973

Honorable Charles M. Metzner
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, NY 10007

Thomas I. Fitzgerald, as Public Administrator
v. Texaco, Inc. and Texaco Panama, Inc.
72 Civ. 5008 and Consolidated Cases
72 Civ. 5009-10, 73 Civ. 92-99, 117
162 and 182
Poles Tublin File #12,515 MJT/JJD
Our files #4246-1 and 1A

Your Honor:

We refer to our hand-delivered letter to Your Honor of November 29. Receipt of telephoned advices from Chambers is acknowledged, at 2:47 p.m. that day, that it is Your Honor's intent that all depositions which might be noticed by plaintiffs of their parties, in order to defend against the underlying dismissal motion, should be considered barred under the terms of Your Honor's order of November 15, 1973.

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*Vessel and Cargo's Letter to Metzner, J. (with Copy to
Magistrate Jacobs) of 3 Dec 1973 Confirming the
Court's Telephoned Advice that Plaintiffs were
Barred from Taking any Oral Depositions*

We are grateful for the promptness of Your Honor's
response.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By /s/ MD
MacDonald Deming

MD:br

cc: Poles, Tublin, Patestides & Stratakis
Martin D. Jacobs, United States Magistrate
Harvey Goldstein, Esq.

**Death Claimants' Counsel Mr. Goldstein's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HARVEY GOLDSTEIN, being duly sworn, deposes and says:

He is the the attorney for the distributees of the estates of twelve deceased seamen, plaintiffs in this matter, and is fully familiar with the pleadings and proceedings heretofore had herein.

This affidavit is submitted in opposition to the defendants' motion to dismiss this suit arising out of the sinking of the M/V "BRANDENBURG" on January 12, 1971 by a section of the submerged hull of the vessel "TEXACO CARIBBEAN" *on the high seas* between the coasts of England and Continental Europe.

The distributees of the estates of the seamen, citizens of the Republic of West Germany, with the advice of a West German governmental agency, retained an attorney in New York to pursue this matter against the TEXACO oil interests for TEXACO's negligence and the negligence of its wholly-owned subordinate, subsidiary corporation, TEXACO PANAMA, arising out of the failure of TEXACO and TEXACO PANAMA to properly locate and mark the hull of the sunken "TEXACO CARIBBEAN" and to advise shipping of its location in order to avoid the danger of just what did happen.

*Death Claimants' Counsel Mr. Goldstein's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss*

For purposes of toling a guideline limitation statute, suit was also brought in the United States District Court in Wilmington, Delaware, since the parent corporate defendant, TEXACO, was incorporated in that State. That suit is for holding purposes only and has not been active since service was perfected against the defendants.

Defendants seek to eviscerate this suit by compelling the distributees of the estates of the deceased seamen to seek relief in England. The grounds for their motion to dismiss for *forum non conveniens* are that:

1. There is no connection with the United States;
2. The action arose *in a foreign country*;
3. Foreign law is applicable;
4. All the witnesses are in England and are unavailable;
5. Trinity House and the owners of the M/V "PARACAS" are beyond the jurisdiction of this Court and are indispensable parties to this suit.

In point of fact all of the above are either not true or have not been established at this time. The future of this suit, involving so many families, is being decided on this motion since the dismissal of the matter will, almost with certainty, bar the bringing of a suit in England.

As the Court knows, companion cases are brought by cargo owners or consolidated with the claims for wrongful death. The attorneys for the cargo owners are in a joint endeavor with deponent in defending against this motion and deponent respectfully asks the Court to consider the submissions of both offices as one.

*Death Claimants' Counsel Mr. Goldstein's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss*

1. The defendant, TEXACO, and the suit is primarily against TEXACO as the controlling interest of the "TEXACO CARIBBEAN", is a New York based, Delaware incorporated United States corporation, controlling a world-wide oil combine from its New York offices in the Chrysler Building on 42nd Street. The offices occupy multiple floors, the directory for them is almost half that of the entire building, one of the largest in the world. The connection with New York by TEXACO is so all pervasive that any case brought in any other forum would be open to transfer to New York for just that very reason. The Court can satisfy itself as to TEXACO's connection with New York by its own records of TEXACO as a party defendant in other suits, maritime and non-maritime in this Court, where service was made and accepted against TEXACO at the brain of the combine (in this City; its tentacles reach to various areas throughout the world. One of its many areas of interest is shipping to bring its product to market. For that purpose and in the interest of profit (perfectly proper and no suggestion of impropriety is inferred), TEXACO created TEXACO PANAMA in Panama as a wholly-owned subsidiary, totally controlled corporation managed by TEXACO from its New York office, the Panamanian corporation having little more than a mailing office in Panama, with the New York office controlling the movements of its vessels to provide the coordination for necessary tankers as part of the over-all business plan to provide its oil for sale around the world.

While the plaintiffs have not been permitted to establish this at this time because of limitations placed

*Death Claimants' Counsel Mr. Goldstein's Affidavit in
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on pre-trial discovery, there is no doubt that that what is set forth herein is the fact and is an offer of proof-to-be.

This suit is, in point of fact, one against TEXACO, a United States corporation, incorporated in Delaware and having its principal place of business in New York (as admitted by defendant on page 33 of its brief where TEXACO is admitted to be a New York defendant [only because of its principal place of business, although incorporated in Delaware]).

And it is to be the proof that when the "TEXACO CARIBBEAN" sank, word was immediately given to the TEXACO office in London to make some decision about possibilities of salvage, marking with buoys, etc., that it could not do so and refused to do so until it received instructions from New York, that the "BRANDENBURG" struck the submerged hull before New York could answer—and that such failure to act in any way was a cause if not the cause of the loss to the families of the "BRANDENBURG" crew. This again is an offer of proof-to-be. That establishes not merely a connection with the suit, but in fact the prime responsibility for the loss sustained resting with the TEXACO principal office in New York.

And so—there is in fact proper jurisdiction over the defendants since they have been served in New York by the United States Marshal and have not objected to or refused to accept it.

And proof has been offered to the Court of policy statements from TEXACO to its customers establishing such control in all areas of its business other than for the mechanical operation of its fleet by its underlings in London (after the world-wide movement of its ships

*Death Claimants' Counsel Mr. Goldstein's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss*

was determined in New York) and TEXACO has never denied the existence of the statement, nor has it offered any statement of change of control over the entire oil procurement and marketing operation emanating from its New York office since the date of that original statement 4 years before the collision of the "BRANDENBURG" with the hull of the "TEXACO CARIBBEAN".

And TEXACO and TEXACO PANAMA periodically have its vessels in the New York area, docking in Staten Island and also at the Port Elizabeth docks, all of which can be verified by a telephone call to the Maritime Exchange in Manhattan. In fact an *in rem* action was commenced against one of those ships but service could not be perfected because deponent could not raise \$2,000.00 from the clients, the deposit required by the United States Marshal before the vessel was libelled.

2. The defendants have stated that the collision occurred in England, in English waters. While the defendant says that the act occurred within 12 miles of England, its papers deliberately omitted that England has the same maritime limitation as does the United States, 3 miles, and that this entire series of events occurred not in English waters, but on the *high seas*. The defendant has been very careful in not telling the Court of the English 3 mile limit and has sought to mislead the Court by constant reference to the matter occurring within 12 miles of England, coupled with a deliberate erroneous conclusion that local British law is applicable.

That simply is not so.

3. The general maritime law is solely applicable to a collision on the high seas, no matter how close to

*Death Claimants' Counsel Mr. Goldstein's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss*

land, if outside any local limit. Such is the case herein. What would occur of course, is that the forum would apply its own concept of the general maritime law and, in New York, the general maritime law of the United States would govern.

Such law is applicable and the plaintiffs have properly chosen it. As such, this matter is not and has never been subject to British law in any respect and this Court need not concern itself with questions of interpretation of or proof of any law other than what is customarily applied in any collision and/or negligence matter occurring on the high seas and properly brought in this Court.

4. The question of what witnesses are necessary and needed to properly present this suit to the Court by both plaintiffs and defendants cannot be fully answered at this time. Deponent knows that some witnesses from Trinity House, the British equivalent to the United States Coast Guard, will be helpful. That may be one or two or perhaps several witnesses, both from its land office and from its ship. Also—some of its documents will be of aid in the presentation of this case. Those documents would, of course, be as available here as they would in England since they are public and subject to disclosure. A Court order from this Court for a foreign commission by deposition is uniformly acted upon by a British Court and has resulted in depositions of witnesses in Europe in countless cases. Other than that, England is no more involved in this matter than any other nation. There are officers and crews of an American ship who are witnesses to the place of the sinking of the "TEXACO CARIBBEAN" and to the rescue operation following the

*Death Claimants' Counsel Mr. Goldstein's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss*

sinking of the "BRANDENBURG". They would most likely be available in New York when they come into port or at least in the United States. There are Dutch salvage interests who would have to be deposed no matter whether the suit is in New York or in England. There are depositions of the German families and the cargo owners in Germany and elsewhere, but they are not in England or in the United States. Any witnesses from the "PARACAS" are South American; however, deponent does not believe that this suit for failure of the controllers of the "TEXACO CARIBBEAN" to act properly following its collision with the "PARACAS" involves the "PARACAS" or its owners and no suits have been started by any interest associated with the "BRANDENBURG" against the "PARACAS". In any event that would simply enlarge the scope of the pre-trial preparation to South America. In addition to any or all of the above, the foundation of this suit involves major witnesses to TEXACO's failure to take any proper action and they are in TEXACO's office in New York City and are available here and no place else, and can be subpoenaed here and no place else. And that is the core of the suit and the reason for the unusual amount of papers previously submitted to the Court as preliminary moves to the viewing of this motion. It is caused by the effort of the defendants to deny access to its witnesses who would light up the failure of TEXACO's New York office to take the steps that its control over its shipping empire required it to do.

And that is one reason why this motion to remove this case from this Court by dismissal would in fact be a final dismissal.

*Death Claimants' Counsel Mr. Goldstein's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss*

5. Deponent has no information as yet that Trinity House is at fault in this matter. Certainly, no discovery has been taken that would establish any liability. Whether Trinity House is an indispensable party as defendants claim cannot be answered at this point, but actually no suit should be dismissed because of a bold and totally uncorroborated assertion that it is.

And if the facts ultimately show that liability is with Trinity House, of what importance is that when dismissal of this suit from this Court will almost certainly destroy plaintiffs' day in Court on the merits.

The owners of the "PARACAS" are undoubtedly subject to *in rem* jurisdiction in New York if the defendants want to add it as a Third Party Defendant. No such move has been made as yet. Deponent would oppose such a move on the ground that this suit is not against TEXACO for causing the original collision but for what TEXACO did and failed to do after that point in time.

The affidavit of MacDonald Deming, attorney for the cargo owners, will spell out for this Court the differences in the law that would change the outcome of this suit. Suffice to say, in this Court the plaintiffs may rely upon the general maritime law of the United States and its general acceptance of the rule that a party cannot unilaterally abrogate its own responsibility to another, to the detriment of still others. In England, that is not the general rule. Plaintiffs have a perfect right to bring suit in the jurisdiction where the defendant has its principal office (as has been done here) and to ask that the Court apply the prevailing law with equal favor to all parties. Defendants would have

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this Court dilute plaintiffs' position under the law by compelling them to proceed in England to plaintiffs' detriment. No case has ever required that; in fact the opposite is true.

Plaintiffs cannot retain British counsel on a contingency fee basis since that is illegal in England. As such, unless each of the widows of the dead seamen can gather up sufficient funds to pay solicitors and barristers for their fees and the enormous contemplated expenses in proving this suit in advance, the matter will fall by dint of lack of finances. Can the need to take some depositions in England, especially if other depositions in New York would be needed if the suit was in England, be compared to what would be a catastrophic problem to twelve families if this matter was dismissed.

The English system gives no right to a jury in matters of this type. A jury has been demanded herein as a right which the plaintiffs, through their attorneys in New York and the Public Administrator of New York County, feel should be preserved in this matter. Forcing the plaintiffs to bring suit in England would deprive them of that right.

As is set forth in the many cases contained in the briefs of the parties, the plaintiffs' choice of forum must be maintained unless the defendants show a balance clearly in their favor to obtain dismissal. It is respectfully submitted that the defendants have not established anything other than by uncorroborated assertions, mistaken facts, misleading applicable law and the obvious thought that they would dearly love to have this matter away from the United States. Their language is couched with concern for the problems of the Court and for this the Court is misled into believing that British law is solely applicable so as to involve this Court with the complicated process of interpreting foreign law. It is not so. Let the Court not be misled, the

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defendants are anxious to have this case dismissed for the very practical reasons of having more favorable English law available to them, loss to the plaintiff of the major witnesses to defendants' failure to act in New York, financial burdens placed upon the plaintiffs to continue, loss of the right of a trial by jury.

No showing of any substantial deprivation to the defendants having been made out, a showing of such detriment to the plaintiffs having been shown if this motion is granted, proper jurisdiction vesting in this Court because the defendants have their principal office performing the major policy duties and setting those policies for the combine from New York, deponent respectfully asks that this Court not destroy the right of twelve families to just compensation for the deaths of their providers.

/s/ HARVEY GOLDSTEIN
Harvey Goldstein

Sworn to before me this
8th day of December, 1973.

**Vessel and Cargo's Counsel Mr. Deming's Affidavit in
Opposition to Texaco Defendants' Motion to Dismiss**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MacDonald Deming being duly sworn deposes and says:

1. I am an attorney admitted to the Bar of the State of New York and of this Court; I am a member of the firm of Haight, Gardner, Poor & Havens counsel for Hapag-Lloyd A.G. and Stork Amsterdam N.V. et al., plaintiffs in this consolidated lawsuit, and am familiar with all proceedings in these matters.

2. This affidavit is submitted in opposition to defendants' motion seeking to dismiss the actions herein on the ground of *forum non conveniens*.

3. This case arises out of collision on January 12, 1971, on the high seas in the English Channel at about 0730 a.m. of Hapag-Lloyd's Brandenburg with the unlocated, unmarked sunken after section of the M/V Texaco Caribbean. Total loss of the Brandenburg and her cargo, and heavy loss of life of her crew, resulted as the Brandenburg sank almost immediately.

4. The unmarked, unlocated Texaco Caribbean was on the bottom because of collision at about 0400 on January 11, 1971, with the M/V Paracas. This fact, although repeatedly emphasized by Texaco Caribbean counsel, is

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wholly irrelevant on this motion. The cause of action asserted for plaintiffs represented by your deponent is based on Texpan's failure to locate and mark this wreck—not in any way on any earlier collision navigational negligence of Texaco Caribbean. The presence or absence of surviving Texaco Caribbean crew members in England is therefore also totally irrelevant. They are not witnesses to anything put in issue by these plaintiffs.

5. Presence or absence of surviving crew members of Texaco Caribbean is irrelevant for a second reason also. Your deponent is informed that all Texaco Caribbean crew members who were on duty at the time of the collision with Paracas died in that collision. Thus, even if that collision were relevant (which it is not), none of the surviving Texaco Caribbean crew members are witnesses to it.

6. The forward section of Texaco Caribbean sank promptly. The stern section remained afloat for about 10 hours, until about 2:08 p.m. in the afternoon of January 12th.

7. While Texaco Caribbean's stern remained afloat, indeed shortly after the collision with Paracas, the United States flag freighter "Leslie Lykes" arrived in the exact vicinity of the wreck of Texaco Caribbean; she stood by for several hours. Crew members of Leslie Lykes observed that a Samson Post of Texaco Caribbean was close enough to the water to permit attachment of a life preserver or other floating marker, so that the slowly sinking stern section would have been marked after it submerged.

The members of the crew of the Leslie Lykes are therefore important eye witnesses to Texaco's opportunities to

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mark the wreck while it was still only partially submerged (a situation which continued for about 10 hours after the collision); and witnesses also to Texaco's failure to take any such action.

The Leslie Lykes, owned by Lykes Bros. S.S. Co., is United States Registered with a home port of Jacksonville, Florida, United States of America. She trades regularly to United States ports so that the testimony of her crew and her records recording the events of that tragic morning will be most readily available in the United States. See affidavit of Werner Hummel (Exhibit A hereto).

8. In the morning of January 11, 1971, before Texaco Caribbean's stern section sank, the firm of Smit-Tak/-Rotterdam, a well-known salvage company, offered the services of their well equipped wreck searching and salvage vessel "Orca" to TOT London. The offer was not accepted. Smit-Tak understood that the reason for her nonacceptance was that she could not be accepted without authority from the Texaco Caribbean interests New York. This is one of a number of indications that central control over any efforts which might have been made by the Texaco Caribbean interests to locate and mark the sunken wreck before the Brandenburg should strike her was located in New York, not in England (see Exhibit A, paragraph 3, page 2).

9. The limited nature of authority and control by TOT London and the central control in New York is further shown by a telex from Mr. P. Mitchell of Smit-Tak London to Smith-Tak head office Rotterdam entitled "Texaco Caribbean". It states that the matter of daily hire of the Smit-Tak salvage vessel "Bever" had been discussed with Captain Watson of Texaco London, who said he was required to contact New York for authority to charter the "Bever",

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and would be calling Smit-Tak that afternoon to advise of the decision. This telex indicates that TOT London was not allowed to decide daily charter rates of about U.S. \$1,000 even in emergency situations. (Exhibit A, page 2, paragraph 4; copy of this telex is attached hereto as Exhibit B.) Neither "Bever" nor any other search or salvage ship was sent to the scene by the Texaco Caribbean interests before Brandenburg sank.

10. The central control of policy matters of Texaco Panama Inc. in New York is further shown by circular letter which on information and belief was sent by Texaco Panama Inc. during the month of December, 1967 to various owners or disponent owners of vessels then in the Tex-Pan time-chartered fleet.

The said letter was sent on stationery bearing the following letterhead:

"TEXACO PANAMA, INC.
135 EAST 42ND STREET
NEW YORK, NEW YORK 10017"

The said letter was signed:

"JOHN I. MINGAY
CHAIRMAN OF THE
BOARD OF DIRECTORS"

The said letter included the following language:

"Dear Sirs:

. . . we have previously informed you that under a Ship Management arrangement Overseas Tankship (U.K.) Limited would issue voyage orders and handle ship positions, ETS's, ETD's, etc., on behalf of the Texpan time chartered fleet.

*Vessel and Cargo's Counsel Mr. Deming's Affidavit in
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On November 20, 1967 the name of Overseas Tankship (U.K.) Limited was changed to Texaco Overseas Tankship Limited.

Effective January 1, 1968, Texaco Overseas Tankship Limited will expand their function of Ship's Managers and also handle the operations and *routine business* of vessels owned and chartered by Texaco Panama Inc., under the Ship Management Agreement.

All invoices, including those covering supplemental charter hire, should be forwarded to London for processing; *however, payment of hire and matters pertaining to charter party terms will continue to be handled by Texaco Panama Inc. in New York.*

* * * *

Kindly instruct the Master(s) of your vessel(s) of the foregoing, with specific reference to Deck and Engine abstracts, Notices of Readiness, Report of Soundings and Cargo Tank Dry Receipt. *However, Ship Utilization Reports should continue to be sent to New York.*

Please acknowledge receipt and understanding of this letter.

Very truly yours,

JOHN I. MINGAY" (emphasis added).

As above noted the telex concerning the "Bever" (Exhibit B) indicates that even emergency situations did not give authority to TOT London for chartering vessels without authority from Texpan Inc., in New York.

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11. About 2:08 p.m. the stern section of Texaco Caribbean sank unmarked below the surface. It apparently did not immediately sink to the firm position on the bottom.

12. After the sinking of the stern section of Texaco Caribbean at about 2:08 p.m. January 11, 1971 Smit-Tak renewed its inquiries of the Texaco Caribbean interests. However the salvage concern received no instructions, evidently because Texpan in New York had not given the necessary instructions.

13. At about 4:30 p.m. on January 11, 1971 the ship Siren, which had been dispatched by Trinity House (roughly the equivalent of our Coast Guard) to the collision area that morning, finally arrived at the area. The stern section of Texaco Caribbean had by then already sunk. Those on Siren had no real idea of where the sinkings had occurred. They stationed themselves at the westerly edge of an oil slick which was visible in the area.

14. At nightfall Siren abandoned her efforts to locate the sunken Texaco Caribbean. Siren stayed anchored for the night, showing three vertical green lights. Her anchored position as shown by the later location of the actual wreck was about a mile from the actual location of the sunken Texaco Caribbean.

15. At about 0730 a.m. January 12, 1971 Brandenburg, whose navigators had no knowledge concerning the facts of the sinking or location of the wreck other than their observation of the three vertical lights of the Siren in the distance, struck the stern section of Texaco Caribbean. Brandenburg sank almost instantly and became a total loss with all her cargo, and with loss of life of many of her crew.

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16. The sinking of the Brandenburg was not witnessed by those on the Siren. This is graphically shown by the fact that no warning signals were given, nor any rescue efforts made by the Siren following the sinking of the Brandenburg.

17. The sinking of the Brandenburg was not witnessed by those on the fishing boats so frequently emphasized in the papers filed by Texaco, Viking Warrior and Accord. This is dramatically shown by the fact brought out in the testimony given at Coroner's hearings held at Folkstone and also at the hearing held in Germany, that crewmembers of Brandenburg struggling in the icy water after Brandenburg sank expected quick rescue but in fact were not rescued for nearly two hours after the sinking.

18. The Captain of the Viking Warrior fishing boat testified to the Coroner that his vessel arrived at the fishing ground around 5 a.m. on January 12, 1971 but "we never saw anything until it got daylight". The first thing he noticed was a light in the water evidently from a life jacket or raft. The Viking Warrior then picked up some survivors from Brandenburg, four alive and one body, and returned to Folkstone.

19. The Siren testified to the Coroner that they observed two oil slicks but darkness set in before they were able to make effective sweeps searching for the wreck so they anchored to await daylight three tenths of a mile to the West of the most westerly and largest of the oil slicks. Those on Siren did not hear until about ten o'clock in the morning of Brandenburg sinking.

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20. After the sinking of the Brandenburg her Owner immediately employed the salvage firm of Smit-Tak, whose offers to the Texaco Caribbean interests had been rejected following the sinking of Texaco Caribbean. The "Orca", equipped with very modern wreck searching equipment, was dispatched to locate the sunken wrecks. She located them by sonar within half an hour of her arrival at the scene of the casualties. Her personnel say that if so requested after Texaco Caribbean's early collision with Paracas, Orca would have reached the collision area in plenty of time to locate and mark the wreck before Brandenburg reached the area. The actual situation was that Texaco Caribbean's sunken unmarked wreck was not located and marked until Orca arrived after the Brandenburg sinking.

Personnel of the Orca are therefore of great importance both as to the exact location of the wreck and as to actions available to Texaco Caribbean interests to locate and mark. The witnesses include the superintendent, captain and two divers. They are Dutch. Their company is located in the Netherlands. The company's salvage business is worldwide and these witnesses are frequently called to nearly all parts of the world including the United States in connection with their work (Exhibit A Page 3 § 6).

21. Brandenburg's representative Mr. Werner Hummel, who promptly investigated the tragedy, has stated (Exhibit A Page 3 § 7) that his investigation shows no representatives of Texaco were in Folkstone or Dover to look into the circumstances of the wreck or do anything about it until 15 January 1971, four days after the Texaco Caribbean sank. That Texaco Caribbean representative was not from London but was normally stationed at Monaco.

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22. The witnesses on watch on Brandenburg reside in Germany, are still employed by Brandenburg's Hamburg Owners and serve from time to time on vessels making voyages to United States Eastcoast ports. (Exhibit A, Page 4, § 8). It follows that they are readily available, and willing to testify, in this Court and indeed almost certainly subject to the process of this Court within a reasonable time.

23. The motion papers on behalf of the Texaco Caribbean interests repeat a number of times the statement that the collision with Brandenburg happened less than 12 miles from the English Coast. Apparently this is intended to imply that it happened within English territorial waters. It should be noted that England like the United States has a three mile not a twelve mile limit. According to the affidavit of David J. O. Graham, English solicitor (attached hereto as Exhibit C) "the collision occurred outside the jurisdiction of the English Courts".

24. The Harris affidavit submitted by Texaco Caribbean stresses that inquests were held in England. Solicitor Graham points out (Exhibit C, Page 1, § 3) that English law requires that if a dead body is brought ashore in England an inquest must be held to ascertain the cause of death only. The inquest to which reference is made concerned the deaths of members of the crew of the Texaco Caribbean and some members of the crew of the Brandenburg. They were not inquiries into the cause of the accidents.

25. The papers filed on behalf of the Texaco Caribbean interests devote many pages to listing the suits filed in England. Two of those suits are totally irrelevant to the cause of action urged on behalf of the plaintiffs for whom your

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deponent acts. These are the cross suits by the Texaco Caribbean and the Paracas against each other on the basis of their earlier collision. The collision between Paracas and Texaco Caribbean is unrelated to the breach by the Texaco interests of their duty to locate and mark the wreck of Texaco Caribbean, on which our suits are founded.

Of the suits listed in paragraph 4, page 2 of the Harris affidavit:

(a) The suit by *some* of the cargo on Brandenburg is the *only* English suit which we understand to have proceeded beyond filing to prevent time bar.

(b) Suit by Texaco Caribbean against Paracas is as above noted irrelevant to the present suits. In any event this suit has not proceeded further then service of the writ and arrest of the Paracas (Exhibit C, Page 2, § 4).

(c) The suit by the Paracas against the Texaco Caribbean is as above noted irrelevant to the present suits. In any event it is not active in that the writ has been served upon the Solicitors for the Owners of Texaco Caribbean but they have not yet accepted service of the writ. (Exhibit C, Page 2, § 4).

(d) Action by Brandenburg against Trinity House. This suit was commenced solely in order to avoid time-bar. The writ has not been served. (Exhibit C, Page 2, § 5).

As noted under (a) above the cargo suit referred to by Mr. Harris represents only part of Brandenburg's cargo. Another firm of London Solicitors issued a writ against the Owners of Texaco Caribbean and against Trinity House.

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"These writs have not been served and were issued to prevent any claim which said part cargo interests might have in respect of this incident being timebarred". Affidavit of Stuart B. MacDonald attached hereto and marked Exhibit "D". Exhibit D concludes:

"I understand that an action on behalf of these same cargo interests is currently proceeding in the United States District Court of the Southern District of New York U.S.A.".

26. The documents submitted on behalf of the Texaco Caribbean interests include numerous references to broadcast messages following the collision of the Paracas and Texaco Caribbean. However as indicated by the attachments to Exhibit "C" the test and circumstances of these messages is readily available in documentary form and present no problems of obtaining testimony.

27. The papers on behalf of Texaco Caribbean interests repeatedly stress their contention that testimony of Trinity House witnesses will be required. Our inquiry indicates that there are only three or four such witnesses. Their testimony could be readily obtained by deposition. As the United States Supreme Court has noted, "it is not unusual for important issues in international admiralty cases to be dealt with by deposition". *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S., 19 (1971).

28. As to the allegedly great expense involved, it appears clear that the expense of two or three attorneys traveling to England to take a series of depositions over a period of a few days is insignificant in the context of law suits involving total loss of a vessel, total loss of her cargo,

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and heavy death claims, to a total claimed amount of over \$20,000,000.

29. The papers in behalf of the Texaco Caribbean interests also contend that there is no compulsory process available for obtaining testimony in England. This is incorrect. In the improbable event that the testimony of these few English witnesses could not be obtained voluntarily, application can be made by the United States Court to the English Court for someone to be appointed an Examiner. The Court can order the attendance of witnesses. This is under Order 70 of the English Practice Rules, and Foreign Tribunal Evidence Act 1856, and Evidence By Commission Act 1859. We were so advised in response to specific telex inquiry to Solicitor Graham in London.

30. The Texaco Caribbean interests contend that Paracas and her Owners and Trinity House are essential parties to these lawsuits. As pointed out above Paracas and her Owners are not only not essential; they are irrelevant to the cause of action brought in these lawsuits for failure to locate and mark. Neither is Trinity House an essential party. These suits are for the failures of the Texaco Caribbean interests to locate and mark. In any event we have been advised by Solicitor Graham in response to specific telex inquiry that the limit of liability of Siren is about pounds 30,000 (less than \$80,000 U.S. dollars). Thus any conceivable recovery from Trinity House on the basis of any negligence by Siren is of almost negligible importance in the context of lawsuits in the total claimed amount of about \$20,000,000.

31. The Texaco Caribbean interests assert "there is no good reason for these actions being brought in this dis-

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trict". On the contrary the practical result of compelling Brandenburg and her immediate cargo and deceased crew members to litigate in the England Courts might well be to deprive them of all remedy. In contrast the United States Courts do provide a remedy for the shocking failures with which these plaintiffs charge the Texaco Caribbean interests, namely failing to locate and mark the sunken wreck, leading to this titanic loss of life and property.

The English House of Lords (*The Utopia*, (1893) A.C. 492) and The Court of Appeal (*The Douglas* 7 Probate Division 151) have laid down an inflexible Rule which might well insulate these Texaco Caribbean interests from liability from their faults on the basis of a mere invitation to governmental authority to take action to locate and mark. These authorities indicate that under the English rule when a governmental authority agrees to act in connection with marking a wreck the shipowner has no further obligations to do so.

In sharp contrast several recent decisions by the United States Court of Appeals for the Second Circuit hold squarely that merely notifying governmental authority does not release the shipowner of his continuing nondelegable duty to find and mark the wreck. *The Berwind-White Coal Mining Co. v. Pitney* (Eureka No. 110), 187 F.2d 665, 1951 A.M.C. 638 (2nd Cir. 1951), *Morania Barge No. 140, Inc. v. M&J Tracy, Inc.*, 312 F.2d 78, 1963 A.M.C. 678 (2nd Cir. 1962). The United States Court of Appeals for the Fourth Circuit agrees. *Snug Harbor*, 43 Fed. 2nd 27.

This Court has held that where the foreign law to which defendant is attempting to remit the plaintiff is so unfavorable that granting the motion might result in depriving the plaintiff of all remedy, this is an impelling reason to retain jurisdiction in the United States Court, even in a case in-

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volving a specific agreement for exclusive jurisdiction of a foreign Court and application of foreign law. *Chemical Carriers v. L. Smit & Co.'s International S.*, 154 F. Supp. 886 (S.D.N.Y. 1957). It would be extremely unjust to remit these plaintiffs to the highly unfavorable English jurisdiction in the absence of any forum agreement, and in a case in which plaintiffs are entitled to the strong presumption in favor of their choice of forum granted by the United States Supreme Court. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

WHEREFORE it is respectfully requested that the motion by the Texaco Caribbean interests be denied and this suit be permitted to continue so that justice may be done on the merits.

/s/ MACDONALD DEMING

Sworn to before me this
10th day of December, 1973.

Exhibit A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM

AFFIDAVIT

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE
COUNTY OF NEW YORK, ADMINISTRATOR OF THE ESTATE
OF HAGEN PASTEWKA, DECEASED AND MONICA PASTEWKA,
INDIVIDUALLY, et al.,

Plaintiffs,

—against—

TEXACO INC. AND TEXACO PANAMA, INC.

Defendants.

HAMBURG, GERMANY) ss.:

WERNER HUMMEL, being duly sworn, deposes and says:

1. I have been a sailor for altogether 12 years before I became a member of the Claims/Insurance Department of HAPAG-LLOYD AG, Hamburg, in 1968. I obtained the Mate's License in 1965 and the Master's License in 1968. Presently I am the nautical expert of HAPAG-LLOYD AG for collision, stranding, etc. At least every 2 years I am serving as a Chiefmate for one voyage on one of our vessels.

Exhibit A

2. Following notification of the collision of the "BRAND-ENBURG" with the wreckage of the "TEXACO CARRIBEAN", on January 12, 1971, I was immediately dispatched to the scene by Mr. Peter Paulsen, being the Manager of the Claims/Insurance Department of HAPAG-LLOYD AG, Hamburg, to conduct an investigation of the accident. In accordance therewith I proceeded immediately to Dover, arriving that same day at about 16.30 hours, and commenced the investigation.

3. I learned in the course of my investigations that, on the morning of January 11th, 1971, the ocean towage and salvage firm of Smit-Tak, Rotterdam, offered to the Texaco Caribbean Interests the services of their wreck searching vessel "Orca", and that the offer was not accepted because it could not be accepted without authority from Texaco's office New York.

4. I have seen a copy of a telex from Mr. P. Mitchell of Smit-Tak, London, to Smit-Tak Headoffice, Rotterdam, under the caption "Texaco Carribean". It states in part that the question of daily hire of the Smit-Tak salvage vessel "Bever" had been discussed with Captain Watson of Texaco, London, who had said he was required to contact New York for authority to charter the "Bever" and that he would be calling Smit-Tak that afternoon to advise of the decision.

5. The U.S. freighter "Leslie Lykes" arrived in the exact vicinity of the wreck of the "Texaco Carribean" very shortly after the collision with "Paracas". They stood by the still floating stern section of "Texaco Carribean" for several hours. Those on the "Leslie Lykes" could observe

Exhibit A

that a samson post of the "Texaco Carribean" was close enough to the water to permit the small boat to attach something to mark the position of the slowly sinking stern section.

Those on the "Leslie Lykes" are therefore important witnesses to the possibilities open to Texaco to mark the wreck before it sank about 10 hours after the collision and to Texaco's failure to take such action. The "Leslie Lykes" is owned by Lykes Bros. S.S. Co. and is U.S. registered, with its homeport at Jacksonville, Florida, U.S.A. My review of recent Lloyd's voyage reports indicates the "Leslie Lykes" trades between the U.S. Gulf and the Far East and is currently steaming back to the U.S., so that the testimony of her crew, and her records regarding the casualty, will be most readily accessible in the United States.

6. Under my direction the "Orca", which is equipped with the most modern wreck searching equipment, was subsequently dispatched to locate the various sunken wrecks, and attempt to examine them with the aid of divers. She located the wrecks by sonar within half an hour of her arrival at the scene of the casualties. I was informed by the personnel of "Orca" that, if Texaco had so requested after the collision of "Paracas" with "Texaco Carribean", "Orca" could have reached the collision area in plenty of time to locate and mark the wreck before "Brandenburg" reached the area. As it was, the wrecked "Texaco Carribean" was not located and marked until the "Orca" arrived at request of HAPAG-LLOYD AG after "Brandenburg's" sinking. The "Orca" witnesses are therefore of great importance both as to exact location of the wreck and as to actions available to Texaco to locate and mark. These witnesses do include superintendent, captain and 2 divers.

Exhibit A

They are Dutch, their company is located in the Netherlands, the company's salvage business is worldwide and these witnesses are called to nearly all parts of the world including the U.S.A. in connection with their work.

7. My investigations indicated that no representatives of Texaco were in Folkstone or Dover to look into the circumstances of the wreck or do anything about it. The first time a Texaco representative arrived in Dover was on 15th January, 1971, 4 days after the sinking of the "Texaco Carribean". I was informed that this representative was not from the Texaco's London office but was normally stationed at Monaco.

8. Those on watch on "Brandenburg" were Chief Officer Peter Trelle and Boatswain Hermann Boettcher. Both reside in German and are still employed by HAPAG-LLOYD AG, Hamburg. They serve from time to time on vessels making voyages to the U.S. Eastcoast ports. They will therefore almost certainly be subject to the process of this court within a reasonable time. In any event they are readily available and willing to testify in this court.

9. Concerning the crewmembers of the British fishing vessels who picked up survivors and bodies of deceased seamen from "Brandenburg", my investigations made it clear that these men did not observe the approach of the "Brandenburg" in the vicinity of the "Siren". In fact the survivors of the "Brandenburg" were in the water for about 2 hours before they were noted by any of the crewmembers of the fishing vessels.

Subscribed and Sworn /s/ WERNER HUMMEL

285a

Exhibit A

Dr. Wolf Harm
Dr. Gerhard Baum
Dr. Erwin Tiedau
Dr. Peter Sieveking
Dr. Arnold Sieveking
Notare

2 Hamburg 1, BergstraBe 11
Sammel-Nr. 32 22 31

Not. Reg. 1973 No. 1803

FREE AND HANSEATIC CITY OF HAMBURG
FEDERAL REPUBLIC OF GERMANY

Sworn to and subscribed before me, Dr. juris Arnold Sieveking, a Notary Public in and for the Free and Hanseatic City of Hamburg, Federal Republic of Germany, by

Mr. Werner Hummel,

merchant, residing at Hamburg 1, Ballindamm 25, who is personally known to me, the Notary, and who appeared before me this 16th (sixteenth) day of May 1973 (one thousand nine hundred and seventy-three), and acknowledged his foregoing signature as his free act and deed.

Witness my hand and seal.

[SEAL]

/s/ SIEVEKING DR.

Exhibit B

RCA1214/043

2163641Z HLH D

4.4.73 18.14 FS NR 32.389 (HEI)

Here Hapagloyd AG for
Messrs. Haight, Gardner, Poor and Havens, New York

For Mr. Deming PLS.
Re.: 'Brandenburg'

* * *

Further a telex from Smit-Tug, London, to Smit-Tak,
Rotterdam with the following very important contents
Was shown to us.:

Quote:

Attn. Mr. Von Den Berg
From P. Mitchell
'Texaco Carribean'

Have discussed daily hire of 'Bever' with Captain Watson
of Texaco London who must now contact New York for
authority to charter 'Bever' and he is calling them 4 p.m.
this afternoon and will advise us of decision after 4 p.m.
either to this office or to Mr. Boer or myself during
course of this evening. I have advised him that the vessel
is currently available and weather favourable but also that
he understands we are not holding the vessel for him until
this decision. Guidance we offered daily all in charter with
divers basis Rotterdam (Rotterdam of Hel. 4050 per day).
He is able to send plans of ship to Dover for our collection

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Exhibit B

of contract concluded which we wud would think favourable.

Unquote

* * *

Regards Hummel

HAPAG-LLOYD AG
041 Assekuranzabteilung

Exhibit C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases)

AFFIDAVIT

Thomas I. Fitzgerald, Public Administrator of the County
of New York, Administrator of the Estate of Hagen Pas-
tenka, Deceased and Monica Pastenka, individually,

Plaintiffs,

—against—

TEXACO INC. AND TEXACO PANAMA, INC.

Defendants.

KINGDOM OF ENGLAND
CITY OF LONDON

DAVID JAMES OGLE GRAHAM, being duly sworn, deposes
and says:

1. I am a partner in the firm of Bentleys, Stokes &
Lowless, Solicitors, of 17 St. Swithin's Lane, London E.C.4,
and my firm has been instructed by the Owners of the
"BRANDENBURG" which was in a collision on the 12th Jan-
uary 1971 with the wreck of the "TEXACO CARIBBEAN". The
collision occurred outside the jurisdiction of the English
Courts.

Exhibit C

2. I have read the Affidavit of Cedric G. Harris dated 2nd February 1973 and have the following observations to make.

3. Under Paragraph 2 of Cedric G. Harris's Affidavit reference is made to attending Inquests in England and attending a hearing held in Germany concerning the collision. The position under English law is that if a dead body is brought ashore in England, an Inquest must be held to investigate the cause of death only. The Inquests to which reference is made concern the deaths of certain members of the crew of the "TEXACO CARIBBEAN" and certain members of the crew of the "BRANDENBURG". The proceedings in Germany refer to an Inquiry under German law into the loss of the "BRANDENBURG" commonly known as the SEEAMT which I understand is set up under statutory authority to enquire into shipping casualties.

4. So far as Paragraphs 3 and 4 of Cedric G. Harris's Affidavit is concerned, of the four suits referred to in Cedric G. Harris's Affidavit, I understand that Action (a) by the owners of cargo laden on board the "BRANDENBURG" against the Owners of the "PARACAS", the Owners of the "TEXACO CARIBBEAN" and the Corporation of Trinity House for loss of the cargo is proceeding. Action (b) by the Owners of the "TEXACO CARIBBEAN" against the motor vessel "PARACAS" has not proceeded further than service of the Writ and arrest of the "PARACAS". Following arrest, the "PARACAS" was released after security had been provided up to the then value of the "PARACAS". The Owners of the "BRANDENBURG" do not share in the security. I understand that Action (c) by the Owners of the motor vessel "PARACAS" against the "TEXACO CARIBBEAN" is not

Exhibit C

active in that the Writ has been served upon the Solicitors for the Owners of the "TEXACO CARIBBEAN" but they have not yet accepted service of the Writ.

5. With regard to Action (d), my firm was instructed to issue a Writ against the Corporation of Trinity House and I caused a Writ to be issued. The Writ has not been served. It was issued to prevent any claim which the Owners of the "BRANDENBURG" might have against Trinity House being time-barred. If the Writ had not been issued within two years of the collision, any claim which the Owners of the "BRANDENBURG" might have against Trinity House would have become time-barred.

6. In Cedric G. Harris's Affidavit under Paragraph 6 (f), he refers to testimony from employees of the Ministry of Defense (Navy) and employees at the North Foreland and Niton Radio Stations concerning communications sent and received prior to and at the time of the casualties. I attach hereto marked A and B respectively, copies of cor-

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Exhibit C

respondence passing between my firm and the Ministry of
Defence and the Post Office.

SUBSCRIBED AND SWORN
to by the above named
DAVID JAMES OGLE GRAHAM
at 5, Fenchurch Street
in the City of London,
England
this 15th day of May
1973

DAVID JAMES OGLE GRAHAM

Before me:

/s/ J. MALCOLM WAUGH
Notary Public
London, England
(J. Malcolm Waugh)

Commission expires at death
[SEAL]

Exhibit A

DJOG/IJC

31st March, 1971.

The Dept. of Trade & Industry,
Marine Division,
1, Victoria Street,
London, S.W.1.

"BRANDENBURG"/"TEXACO CARIBBEAN"/"PARACAS"

Dear Sirs,

We act on behalf of the concerned in the "BRANDENBURG" and it would appear that no warnings concerning the collision on the 11th January between the "TEXACO CARIBBEAN" and the "PARACAS" and the subsequent sinking of the "TEXACO CARIBBEAN" were transmitted by either Dutch or German radio authorities to shipping.

We have been in touch with the International & Maritime Telecommunications Region, Wireless Telegraph Division of the Post Office and they have referred us to you. They have indicated that warnings are promulgated by the Hydrographers Department.

Could you help us by letting us know what steps are taken to inform other countries of casualties at sea so that the necessary warnings can be transmitted by the radio authorities of those countries.

Yours faithfully,

BENTLEYS, STOKES & LAWLESS.

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Exhibit A

This is the exhibit marked "A" mentioned and referred to in the attached Affidavit of DAVID JAMES OGLE GRAHAM sworn this 15th day of May, 1973.

Before me:

/s/ J. MALCOLM WAUGH
Notary Public
London, England
(J. Malcolm Waugh)

MINISTRY OF DEFENCE
Main Building, Whitehall, London S.W.1
Telephone: 01-930 7022, ext. 2575

4 June 71

Reference: DDS5/NH(MO) 640/71

Reference: DJOG/1JC

Messrs. Bentleys, Stokes, and Lawless
67, St Swithins Lane
LONDON EC4M 5FB

Dear Sirs,

BRANDENBURG/TEXACO CARIBBEAN/PARACAS

1. Thank you for your letter of 31st March inquiring about the steps taken to inform other countries of casualties at sea. It has been passed to us to answer by the Department of Trade and Industry.

2. The present arrangements which involve the Hydrographer of the Navy are as follows:—

a. Messages in the "Local Warning Series" of Navigational Warnings, (ie WZ and Port Authority messages) are broadcast to shipping from the Coast Radio Stations in the UK. Details of these broadcasts are given in Notices to Mariners No 9 and No 13 of each year. There is no arrangement whereby these messages are passed to specific authorities of other nations.

b. There is however an arrangement under which those nations which are members of the North Sea Hydrographic Commission (NSHC) pass "Selected Advance Notifications" to the Hydrographer of the

Exhibit A—Annexed to Foregoing Exhibit

Navy for promulgation in the Long Range Warning Series. The countries involved comprise UK, Norway (Chairman), Sweden, Denmark, West Germany and Holland. All warnings in the NAVEAM series are also passed by signal, telex or telephone to Naval Hydrographic Departments in France, Denmark and USA, to naval authorities in Belgium and Holland, and to the German civilian Hydrographic Institute.

3. This arrangement is a recent one, dating from the last meeting of the NSHC in May 1970, and the German Hydrographic Institute was added to the list of receiving authorities after the sinking of the BRANDENBURG.

4. Under the arrangements described above the UK provides a world wide system of warnings (the USA provides a similar service); however it is essentially an interim measure designed to improve the existing national procedures. Further improvements proposed by Hydrographer are currently under consideration by the International Hydrographic Organization, and it is to be hoped that they will form the basis for an international system of warnings designed to ensure the reception, by all shipping, of information concerning their present and future positions.

Yours faithfully

/s/ K R TEBBIT
K R Tebbit

KRT/PR/24

Exhibit A—Annexed to Foregoing Exhibit

DJOG/MC
D/D55/NH(MO)640/71

8th June, 1971

K.R. Tebbit, Esq.,
Ministry of Defence,
Main Building,
Whitehall,
London S.W.1.

Dear Sir,

“BRANDENBURG”
“TEXACO CARIBBEAN”/“PARACAS”

We thank you for your letter of the 4th June.

In our letter of the 31st March to the Department of Trade and Industry we asked about the steps taken to inform other countries of casualties at sea. We are grateful to you for providing this information.

We wrote to the General Post Office earlier and asked them for similar information. We also asked them whether, and if so when, information with regard to the “TEXACO CARIBBEAN” wreck was transmitted to either the Dutch broadcasting authorities or the German broadcasting authorities. The Post Office replied to the effect that they were unable to assist inasmuch as the warnings are promulgated by the Hydrographics Department. It was for that reason that we contacted the Department of Trade and Industry.

With regard to your letter, can you let us know when the Dutch Hydrographic Department were warned of the “TEXACO CARIBBEAN” casualty? At the same time would

Exhibit A—Annexed to Foregoing Exhibit

you be kind enough to let us know whether it was passed by signal, telex or telephone?

We assume from paragraph 3 of your letter under reply that the German Hydrographic Institute were not warned.

For your own information the reason we are making these enquiries is that we have no evidence that those on board the "BRANDENBURG" received any warning of the "TEXACO CARIBBEAN"/"PARACAS" collision and the subsequent sinking of the "TEXACO CARIBBEAN". It is almost certain that the Radio Officers were not listening in to British radio stations but were probably listening in to the Dutch or German radio stations. It is established that the German radio stations did not send out any warnings. We wish to be able to establish that the Radio Officers were not in any way negligent. There is of course no suggestion that either the Ministry of Defence were negligent or indeed that any of the Hydrographic Institutes were negligent.

Yours faithfully,

BENTLEYS, STOKES & LOWLESS.

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MINISTRY OF DEFENCE

Main Building, Whitehall, London S.W.1A 2HB

Telephone: 01-930 7022, ext. 2575

Reference: D/DS5/NH(MO)640/71

Reference: DJOG/NC

Messrs. Bentleys, Stokes & Lowless
7, St. Swithins Lane
London EC4M 5FB

7th July, 1971

Dear Sirs,

In your letter of 8th June, you asked for details of navigational warnings issued after the sinking of the TEXACO CARIBBEAN and before the BRANDENBURG collided with the wreck the following day.

2. Shipping was warned in this period by the short-term Radio Navigational Warnings, (WZ messages), by Coast Radio Stations at Niton and North Foreland. Details of these Post office broadcasts are attached.

3. Neither the Dutch nor the German Authorities were otherwise informed of the TEXACO CARIBBEAN wreck positions until after the loss of the BRANDENBURG. The Dutch Hydrographer received a signal (Date/Time group 12 (Jan) 1440gmt), in accordance with the NAVEAM procedure outlined in our previous letter of 3rd June. The German Hydrographic Institute received details of the wreck later that afternoon in a signal sent at 1550 gmt.

Yours faithfully,

/s/ K. R. TEBBIT
K. R. TEBBIT

Exhibit A—Annexed to Foregoing Exhibit

SHORT TERM WARNINGS IN THE WZ SERIES

NITON		NORTH FORELAND	
Voice (1834 KHz)	Morse (464 KHz)	Voice (1848 KHz)	Morse (418 KHz)
11th Jan 1418GMT	1414GMT	WZ	{ 11th Jan 1426GMT 1436GMT
" 1635 "	1653 "	message	{ " 1605 " 1654 "
" 2036 "	2033 "	No 017	{ " 2005 " 2055 "
11th Jan 2208GMT	2205GMT	WZ	{ 11th Jan 2205GMT 2201GMT
12th Jan 0437 "	0836 "	message	{ 12th Jan 0408 " 0853 "
" 0842 "		No 018	{ " 0845 " 1252 "

Exhibit A—Annexed to Foregoing Exhibit

DJOG/MC
D/DS5/NH (MO) 640/71

12th July, 1971

K.R. Tebbit, Esq.,
Ministry of Defence,
Main Building,
Whitehall,
London S.W.I.

Dear Sir,

“BRANDENBURG”
“TEXACO CARIBBEAN” & “PARACAS”

We thank you for your letter of the 7th July in connection with the navigational warnings issued following the sinking of the “TEXACO CARIBBEAN”.

Yours faithfully,

BENTLEYS, STOKES AND LOWLESS

Exhibit A—Annexed to Foregoing Exhibit

DJOG/MC

14th January, 1971

Head of Department,
Radio and Broadcasting Department,
Armour House,
St. Martin's-le-Grand,
London E.C.I.

Dear Sir,

“BRANDENBURG”
“TEXACO CARIBBEAN” AND “PARACAS”

We are instructed on behalf of the Owners and Underwriters of the “BRANDENBURG” which, as you are probably aware, is thought to have struck the wreckage of the “TEXACO CARIBBEAN” last Tuesday morning, as a result of which she sank.

We would be grateful if you would provide us with the times and texts of all radio messages transmitted to shipping following the collision between the “TEXACO CARIBBEAN” and the “PARACAS” during the morning of the 11th January.

Yours faithfully,

BENTLEYS, STOKES & LOWLESS

This is the exhibit marked “B” mentioned and referred to in the attached Affidavit of DAVID JAMES OGLE GRAHAM sworn this 15th day of May, 1973.

/s/ illegible
Wl:Pub:
Notary Public
London, England
(J. Malcolm Waugh)

Exhibit A—Annexed to Foregoing Exhibit

NW

International and Maritime
Telecommunications Region

WIRELESS TELEGRAPH SECTION

POST OFFICE

UNION HOUSE
ST MARTIN'S-LE-GRAND
LONDONTelephone: 01-
Telex: 21601 (POETE LDN)
Telegrams:
IWT Radiogen London EC1From the Inspector of In any reply please quote:
Wireless Telegraphy WT/DV/125Your reference:
DJOG/MCBentleys, Stokes & Lowless
Solicitors
17 St Swithin's Lane
LONDON EC4

18 March 1971

Dear Sir

"BRANDENBURG
TEXACO CARIBBEAN—PARACAS"

As requested in your letter of 14 January 1971 I am enclosing copies of the navigational warnings to shipping about dangerous wrecks in the Dover Straits made on 11 January 1971 by Niton and Northforeland radio stations. The times of the broadcasts are included.

Copies of these messages are attached and our charge for them is £0.75 per sheet and I shall be pleased to receive your remittance for £1.50 for the 2 sheets enclosed.

Yours faithfully

/s/ GRIFFITHS
for Inspector of Wireless Telegraphy

ENCS

Exhibit A—Annexed to Foregoing Exhibit

NORTH FORELAND RADIO
 NAVIGATIONAL WARNINGS RECEIVED AND BROADCAST
 WE 017 To WZ 026 AND WZ 030

WZ 017

Mod Srl 0108 0111300
 Priority North Foreland Radio
 Priority 111020Z Jan
 Period UK Navy
 To AIG 1063
 Niton Radio
 North Foreland Radio
 BT

Unclas FFL WZ 017 Broadcast on receipt and all routines
 begins Dover strait dangerous wreck exists approximately
 two five five degrees one point two miles from Mid Varne
 Buoy ends BT

Received on telex at North Foreland Radio
 at 1425 GMT 11.1.71

Broadcast at the following times

On W/T		On R/T
11/1/71	1436Z 418 Khz	1425Z 848 Khz
	1654Z "	1605Z "
	2055Z "	2005Z "

Cancelled by WZ 018

Exhibit A—Annexed to Foregoing Exhibit

WZ 018

Mod Srl 0904 0111845
 Priority to Poradio N Foreland
 Priority 111645Z Jan
 Fm MOD UK Navy
 To AIG 1063
 Niton Radio
 North Foreland Radio
 BT

Unclass FFL WZ 018 Broadcast on receipt and all routines begins. Dover strait wreck marking vessel showing three green lights in vertical line established one and a half miles west of Mid Varne Buoy. Ships should pass westward of this vessel ends Cancel WZ's 016 (North Foreland only) end 017

BT

Received on telex at North Foreland Radio
 at 2150 GMT 11.1.71

Broadcast at the following times.

On W/T	On R/T
11.1.71 2210 GMT 418 Khz	2205Z 1848 Khz
12.1.71 0853 GMT "	0408Z "
" 1252 GMT "	0845Z "

Cancelled by WZ 21

Exhibit A—Annexed to Foregoing Exhibit

NITON RADIO

NAVIGATIONAL WARNINGS RECEIVED AND BROADCAST

WZ 017 Broadcast on receipt and all routines begins

Dover Strait dangerous wreck exists approximately two
five five degrees one point two miles from Kid Varne buoy

Received on Telex at 1405 GMT 11.1.71

Broadcast at:

11/1	1414	464	RB	11/1	1418	1834	WJ
"	1633	"	DFH	"	1635	"	JMH
"	2033	"	JTE	"	2036	"	JMH

WZ 018 Broadcast on receipt and all routines begins

Dover Strait wreck marking vessel showing three green
lights in vertical line established one and a half miles west
of Mid Varne buoy. Ships should pass westward of this
vessel

Received on Telex at 2159 GMT 11.1.71

Broadcast at:

11/1	2205	464	DS	11/1	2208	1834	KPT
12/1	0836	"	JTE	12/1	0437	"	"
				"	0842	"	JH

Cancelled by WZ 021

Exhibit A—Annexed to Foregoing Exhibit

DJOG/MC
WT/DV/125

25th March, 1971

Inspector of Wireless Telegraphy,
General Post Office
Union House,
St. Martin's-le-Grand,
London E.C.I.

Dear Sir,

“BRANDENBURG”
“TEXACO CARIBBEAN” & “PARACAS”

We thank you for your letter of the 18th March. Do you know whether, and if so when, information with regard to the “TEXACO CARIBBEAN” wreck was transmitted to either the Dutch Broadcasting Authorities or the German Broadcasting Authorities, or is it the usual practice for foreign radio stations to pick up information by listening to, for example, Niton or Northforeland?

In the meantime we are enclosing our cheque for £1.50 in respect of your charges. We shall be obliged if you will acknowledge safe receipt.

Yours faithfully,

BENTLEYS, STOKES & LOWLESS.

Enc.

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Exhibit A—Annexed to Foregoing Exhibit

International and Maritime
Telecommunications Region

WIRELESS TELEGRAPH SECTION

POST OFFICE	UNION HOUSE ST MARTIN'S LE-GRAND LONDON	Telephone: 01- Telex: 21601 (POETE LDN) Telegrams: IWT Radiogen London EC1
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From the Inspector of WT/DV/125
Wireless Telegraphy In any reply please quote:

Your reference:
DJOG/MC

Bentleys, Stokes & Lowless
Solicitors
17 St Swithin's Lane
LONDON
EC4 M 5FB

30 March 1971

Dear Sir

"Brandenburg
Texaco Carribean & Paracas"

Thank you for your letter of 25 March 1971 and the £1.50 cheque for which I have attached a receipt.

Unfortunately I cannot assist you regarding your query about the Dutch or German authorities. The warnings are promulgated by the Hydrographers Department and I suggest that the Department of Trade and Industry, Marine Division may be able to assist.

Yours sincerely

/s/ G. GAIFFORTHS
for Inspector of Wireless Telegraphy

Exhibit A—Annexed to Foregoing Exhibit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases)

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE
COUNTY OF NEW YORK, ADMINISTRATOR OF THE ESTATE
OF HAGEN PASTEWKA, DECEASED AND MONICA PASTEWKA,
INDIVIDUALLY.

Plaintiffs

—against—

TEXACO INC. AND TEXACO PANAMA, INC.

Defendants

KINGDOM OF ENGLAND
CITY OF LONDON

STUART BEAMISH MACDONALD, being duly sworn, deposes and says:

1. I am a Solicitor (Scottish) with Messrs. Clyde & Co. who are the Solicitors instructed on behalf of part cargo interests in the "BRANDENBURG" which was in a collision on the 12th January 1971 with the weck of the "TEXACO CARIBBEAN".

2. My firm was instructed to issue Writs against the Owners of the "TEXACO CARIBBEAN" and the Corporation of Trinity House and Writs were so issued. These Writs have not been served and were issued to prevent any claim which

Exhibit A—Annexed to Foregoing Exhibit

said part cargo interests might have in respect of this incident being time-barred.

3. I understand that an action on behalf of these same cargo interests is currently proceeding in the U.S. District Court of the Southern District of New York, U.S.A.

/s/ STUART B. MACDONALD

SUBSCRIBED AND SWORN
to by the above named
STUART BEAMISH MACDONALD
at 5Fenchurch Street
in the City of London,
England this twenty-seventh
day of November 1973.

[SEAL]

**Texaco Defendants' Counsel Mr. Stern's Reply
Affidavit**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 CMM (and consolidated cases), 72 Civ. 5009
and 5010, 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166
and 182.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALVIN L. STERN, being duly sworn, deposes and says:

1. I am a member of the firm of Poles, Tublin, Patestides & Stratakis, attorneys for the defendants herein and am fully familiar with all the pleadings and proceedings heretofore had in this matter.

2. This affidavit is submitted in support of defendants' motion seeking to dismiss the actions herein and in reply to the affidavits submitted in opposition thereto.

3. As can be seen from the papers submitted by the plaintiffs, it is their contention that the loss of the M/V BRANDENBURG on *January 12, 1971* was caused by a failure to take proper steps to locate and mark the wreckage of the S/T TEXACO CARIBBEAN while she lay in the English Channel subsequent to a prior collision on January 11, 1971 with the M/V PARACAS. Needless to say, defendants deny such a

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

contention. However, the very issue raised by the plaintiff, an issue which plaintiffs previously described as the central merits issue, it is submitted, goes to show how completely ridiculous and untenable is the position taken by them with regard to this motion.

As can be seen from plaintiffs *own* papers in opposition (and especially the exhibits attached to the affidavit of Mr. Deming—all of which come from outside the United States) the records, facts and witnesses with regard to what plaintiffs have previously called "the central merits issue" all lie in England or otherwise outside of the United States.

It is interesting to note that all of the exhibits attached to the affidavit of Mr. Deming have England as their source of information. (See correspondence and records concerning British radio station, affidavit of British solicitor as well as affidavit of Mr. Werner Hummel who claims to have gone to England from Germany to investigate the matter.)

It is also interesting to note that while Mr. Deming in his affidavit attempts to belittle the value of any inquests previously held in England by stating that they were not inquiries into the cause of the accident, he nevertheless apparently attempts to use what he claims to be testimony from these proceedings in his affidavit. It is obvious that although the inquests may have been conducted primarily for different purposes, they nevertheless contain evidence and testimony which would have a direct bearing on the issues raised here.

Deponent does not wish to belabor what should already be obvious. The point is that even plaintiffs' own papers clearly show that the all key and mandatory witnesses, records, and testimony lie in England or places outside of the United States.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

4. The affidavits submitted by both Mr. Goldstein and Mr. Deming are replete with hearsay, double hearsay, conclusory allegations and misstatements of fact—as is also the affidavit of Mr. Werner Hummel. The affidavits, when stripped of the bold allegations (made without personal knowledge) and heart rending appeals on behalf of non-resident, alien widows and children, contain no factual reason sufficient to form a basis for this Court retaining jurisdiction in the matter.

5. Specifically, the affidavits and memoranda filed by plaintiffs contain such bold and unsupported assertions, among others, as follows:

- (a) Texaco was the charterer of the TEXACO CARIBBEAN;
- (b) Texaco was the “controlling interest” of the TEXACO CARIBBEAN;
- (c) TOT and/or Texpan had no personnel on the scene of the casualties until January 15, 1971.

None of these assertions are true and have been made in a deliberate attempt to mislead and confuse the court. The untruth of these statements is shown by the affidavits of Messrs. Dimock, Pointon, Harris and Clayton, previously submitted in support of defendants' motion and will be further shown below.

6. Plaintiffs seem to place much reliance on certain negotiations held between the firm of Smit-Tak/Rotterdam and/or Smit-Tug/London (hereinafter referred to as Smits) on the one hand, and TOT on the other regarding the services of a salvage vessel named ORCA and/or BEVER. Plaintiffs' reliance on the hearsay information contained in

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

the affidavit of Mr. Hummel and the undated telex "quoted"* in Exhibit B to Mr. Deming's affidavit is misplaced and misleading. This hearsay information furnished to Mr. Hammel, however, is not only misleading but is not factually true.

7. In connection with the above-mentioned hearsay statements, Captain John L. Watson, Manager, Operations Department of TOT has prepared an affidavit which is annexed hereto (as Exhibit "A") in support of defendants' motion and in reply to Mr. Hummel's affidavit. Captain Watson's affidavit makes it clear that the first communication between Smits and TOT took place on *January 13th not January 11th* as plaintiffs would have the Court believe and furthermore dealt with an offer for salvage *after the sinking of both the Brandenburg and Texaco Caribbean* and not with any attempt to locate, mark or buoy the wreck of the TEXACO CARIBBEAN. (As has been pointed out previously, Trinity House had already been employed to render these services—i.e. locating, marking and buoys; the wreckage—on January 11, 1971.) Furthermore, the affidavit forever dispels any doubt concerning the question of who had authority to engage services for locating, marking or buoys the wreck of the TEXACO CARIBBEAN and/or salvage vessels. *TOT had the necessary authority, without reference to New York or anywhere else for that matter to take necessary steps to engage the services of anyone who might be required. That authority was exercised by TOT when it engaged the services of Trinity House and the vessel SIREN for purposes of locating, marking and buoys*

*It is interesting to note that a copy of the actual telex relied upon is not attached as an exhibit and that the alleged quoted matter leaves out any date which may have been included in the original telex.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

the wreckage and was also exercised when TOT subsequently, on January 13, 1971, engaged the QUEEN MOTHER for salvage operations at £180 per day on the very same day it rejected Smit's offer for salvage at £500 per day. (It should be noted that this was done within hours after Smit had made its offer to TOT.)

8. It becomes apparent that the Smits' firm is rather willing to supply information to its client, Hapag-Lloyd without checking the accuracy thereof, obviously because TOT rejected its offer. It is further obvious that in order to clarify this aspect of the matter, the testimony of Captain Watson (TOT) and Mr. Mitchell (Smits) in addition to other TOT and Smits' personnel will be required. *All of these witnesses are located in England.* If for any reason the testimony of one or two Smits' employees located in Holland is required, which is doubtful since apparently all transactions with regard to this matter took place in England, it is a lot easier, less expensive and less inconvenient to go across the channel to England then to fly to New York.

9. Plaintiffs also allege in their opposing affidavits that an American flag vessel, the LESLIE LYKES arrived on the scene shortly after the collision with the PARACAS. Apparently this statement is again based on hearsay information supplied to Mr. Hummel, who did not arrive in England until the following day and could not have had first hand knowledge of the events. See Hummel's affidavit, paragraphs 2 and 5. How does Mr. Hummel know what if anything was observed and by what crewmembers aboard the LESLIE LYKES? Why, if the LESLIE LYKES was in fact in the vicinity so shortly after the collision, did those on board not take any action to rescue survivors or mark the area as required by statute?

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

10. Plaintiffs, it appears, has even failed to ascertain (a) the names of those crewmembers aboard the LESLIE LYKES who might have seen something and who might, therefore, be witnesses; (b) whether or not they are still aboard the LESLIE LYKES; (c) their availability for trial in the matter; (d) the substance of the testimony that they could be expected to give; (e) their willingness to testify in the matter; etc. Surely, the convenience of the numerous witnesses in England and Europe; the unavailability of indispensable parties in that jurisdiction and this court's calendar are not to be controlled by the possibility that one or two witnesses from Florida might be able to come to New York—assuming that said witnesses are still on board the LESLIE LYKES and further assuming that they would volunteer to testify in view of the fact that this Court has no jurisdiction over them and could not compel their attendance here in New York. A check with the New York Maritime Exchange, as suggested by Mr. Goldstein revealed that the LESLIE LYKES trades between the Gulf Ports and the Far East and that if it ever came to New York it would be a *very rare occasion*. *The New York Maritime Exchange indicated to deponent that the first and only time said vessel has ever come to New York was in April of 1966, nearly 8 years ago.*

11. Further evidence of the misleading and untrue nature of Mr. Hummel's affidavit is seen from his statements on pages 4 and 5 thereof that his investigations indicated and he was "informed" that no representative of "Texaco" was on the scene until some 4 days after the sinking of the TEXACO CARIBBEAN. While technically this is true because in fact, no one from Texaco Inc. ever went to the scene, it is clear from the affidavits of Mr. Pointon and

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

Caption Watson that TOT personnel were immediately dispatched to the scene of the casualty and were in fact present in Dover on January 11, 1971.

12. Plaintiffs also assert throughout their affidavits whenever a particular witness is being discussed that it would be a simple matter to go here or there and take a deposition. If each isolated instance is taken separately, the suggestion might appear to be reasonable. However, when viewing the entire situation as a whole it can be seen that not one single witness is located in New York and that virtually all the witnesses are located in England and Europe—in other words, the deposition of every possible witness would have to be taken and sent to New York.

13. The absurdity of this suggestion is even further highlighted by the fact that while the majority of the witnesses are in England where prior litigation is pending plaintiffs suggest that this Court have a commissioner appointed to take and hear testimony in England. It would seem vastly more expeditious and practical to have these witnesses testify directly before the English Court where the Judge that is hearing the matter and who will make a decision can observe their demeanor and make a sound judgment regarding their credibility.

14. With regard to the various comments made concerning witnesses, their availability and the necessity for their testimony it should be noted that:

(a) Contrary to Mr. Deming's opinion, the surviving crewmembers of the TEXACO CARRIBBEAN are necessary witnesses to the collision with the PARACAS and events occurring immediately subsequent thereto.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

Whether or not they were actually on duty at the time is irrelevant.

(b) As previously shown, all witnesses from the Smits' firm and particularly, Mr. Mitchell, are in England.

(c) Testimony from the crewmembers of the Trinity House (all of whom are in England) is absolutely necessary to show what steps were being taken (immediately after the PARACAS collision) to locate, mark and buoy the wreck of the TEXACO CARIBBEAN; the traffic that was in the area; the approach and subsequent collision of the BRANDENBURG; whether other vessel observed and obeyed their signals, etc.

(d) Although Mr. Deming does not think the testimony of those on board the various fishing boats in the area is required, he himself quotes from their purported testimony during the inquests in his affidavit. It is submitted that the fishermen's testimony is required, not only on the issue of liability but also on the issue of damages, i.e. conscious pain and suffering, whether dead or alive when first picked up etc. All of these witnesses are also in England.

(e) Any witnesses from the ORCA,* if such personnel are required, would find it much easier, less expensive and convenient to testify in England where Smits has an office rather than travel to the United States.

(f) Most of TOT's employees who participated in the matter are in England. The remaining one or two are in Monaco and could easily travel to England.

*A vessel which apparently came on the scene several days after the sinking of th BRANDENBURG.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

(g) The witnesses on the BRANDENBURG, who reside in Germany, would definitely find it more convenient, and less expensive going to England (where BRANDENBURG's owners have already commenced suit) rather than to the United States.

(h) Witnesses from the Ministry of Defense and the various radio stations are, even based on plaintiffs' own papers, necessary, if for no other purpose than to validate the documents attached to plaintiffs' affidavit.

In Summary, it can readily be seen from the above that if these suits were retained by this Court, the testimony of *every* witness would have to be taken by way of deposition. If on the other hand the suits proceeded in England, as they should, the use of deposition testimony would be minimal, possibly one or two witnesses. *None* of the witnesses are located in New York.

15. Plaintiffs also try to play down the involvement of Trinity House and the PARACAS in this matter. However, it is clear from all the facts presently before this Court that both parties are intimately connected with these actions. The PARACAS for having begun the chain of events which lead to the BRANDENBURG collision less than one day after the TEXACO CARIBBEAN sink. Trinity House because it was on the scene at the time of the BRANDENBURG collision and because it was specifically responsible for locating and marking the wreck. Whether or not these parties will be found ultimately liable must await full discovery and trial of the matter but at this point, it is clear that they are indispensable parties, who not only may be ultimately found liable in the matter but whose testimony is mandatory.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

16. On the question of "central control of policy matters of Texaco Panama Inc. in New York", the affidavits of Messrs. Dimock, Pointon and Captain Watson make it abundantly clear that TOT had all the authority required to make whatever decisions were necessary. The letter quoted in paragraph 10 of Mr. Deming's affidavit is totally irrelevant. Even were it evidence of what the facts were in 1967, it certainly has nothing to do with the state of facts as they were in January, 1971. Whatever may have been required to be done as a result of this casualty, TOT had full and complete authority to take necessary action without reference to New York or anywhere else. Furthermore, it acted on that authority.

17. Plaintiffs' attorneys also state in their affidavits that the suits pending in England are irrelevant. This is clearly not so. In the first place, and most importantly, it places *all* interested parties before the English Courts. In order for complete justice to be granted in this matter it is mandatory that all parties be before the court—such could not be the case in the United States. Since the affidavit of Mr. Graham was prepared in May, 1973, the TEXACO CARIBBEAN's solicitors have accepted service of the writ. See Deming's affidavit, page 10, paragraph 25(c). Of course, the obvious reason why the prior English BRANDENBURG suit is not proceeding at this time is that they hope to proceed with these suits here in New York.

18. Plaintiffs finally argue that English law is unfavorable and that plaintiffs would be deprived of a remedy.* Such, however, is clearly not the case.

*This, it should be noted, is done without any affidavit of support from English counsel.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

The English cases cited by plaintiff stand for the proposition that once a governmental department (Trinity House is not a governmental department) assumes *ownership* or *possession* of a wreck, the original owner is relieved of liability provided they have not been guilty of willful misconduct or neglect. Prior to such a governmental "takeover" however, the vessel owners have a clear duty to protect other vessels.**

The American cases cited by plaintiff are concerned with the application of the Wreck Statute 33 U.S.C. which involves wrecks on the inland navigable waters of the United States and not the high seas. Even were the Wreck Statute applicable (which defendants deny) however, under plaintiffs' own theory of the case the result would be the same both in England and in the United States since under plaintiffs' theory, Trinity House at the time of the BRANDENBURG collision had not yet taken ownership or possession of the wreck.

In any event, under all known principles of Conflict of Laws, English law would have to be applied to the case no matter which forum it is tried in. The Wreck Statute could not be applied to a foreign shipowner with respect to a wreck in the English Channel, resulting from a collision between two foreign vessels and having absolutely no contact with New York.

19. A) With respect to the affidavit of Mr. Goldstein, nothing further need be said except that the vast majority of it is devoted to questions concerned with obtaining *in*

**While deponent is no more qualified in English law than plaintiffs' counsel, the obvious and plain reading of the cases cited by plaintiffs' counsel clearly indicate the law to be contra to what is being claimed by them.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

personam jurisdiction over a defendant, an issue which he himself admits is not relevant herein. The fact is that even assuming *arguendo* that Texaco Panama Inc. had an office in New York (which it does not), that fact alone would be irrelevant. TOT had complete and full authority to take whatever steps were necessary and it is clear that not one single witness would come from New York. See affidavits of Mr. Pointon, Dimock, Watson.

B) Contrary to Mr. Goldstein's belief, neither the PARACAS nor her owners are subject to jurisdiction either *in rem* or *in personam* in New York, nor is Trinity House. Both, however, are parties to suits presently pending in England.

C) Mr. Goldstein's "bleeding heart" argument with regard to contingency fee arrangements in England is totally irrelevant. Not only are legal fees and costs recoverable in England by a successful party, but we have been advised by English counsel that under present English Law, matters can now be handled on a *contingency fee* basis when such matters are referred to English counsel by American counsel who themselves are engaged on a contingency fee basis. Mr. Goldstein need do nothing further than forward these matters to English counsel to protect the "poor widows and children". No funds need be advanced by them. (See pertinent portion of letter of eminent British counsel attached hereto as Exhibit "B".) *

Mr. Goldstein is only worried about "one contingency fee", his own, and apparently he does not wish to share it with co-counsel in England despite the convenience and benefit to be gained by his clients.

* Letter was received in connection with another pending case.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

20. With respect to some of these poor widows and children, it appears that some may be represented by more than one attorney. A review of this Court's docket indicates that a "counselor at law, Proctor in Admiralty" by the name of Robert Borden has filed several "documents" in the matter. None of these documents have ever been served on defendants or ourselves as attorneys and it was only by accident that deponent discovered these documents in the Court file in this matter. Deponent does not know what Mr. Borden's interest, if any, in this matter is but the following comments of Judge Weinfeld in the case of *Noto v. Cia Secula di Armanento*, 310 F. Supp. 639, 649, 650 (1970) with respect to the same Robert Borden may be of deep interest:

"An additional consideration supports dismissal of these actions. The Court must be concerned with and cannot disregard another aspect of the matter³⁵—it came about that these suits were commenced in a court of the United States in 'a community which has no relation to the litigation.' This Court's study of the voluminous papers and briefs submitted on these motions revealed that in April 1968, prior to the filing of these actions, letters had been sent by an out-of-state attorney³⁶ to the families of the disaster victims.³⁷ The letter were accompanied by a 'CONTINGENT FEE AGREEMENT' to be signed by the addressee. The Court sought further information from the attorneys with respect to the matters, and what was submitted obscured rather than clarified the circumstances of the retention of the out-of-state attorney, who in turn retained local counsel. The Court then directed that all persons having knowledge of the facts appear at a hearing. While

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

local counsel of record attended and participated in the hearing, the out-of-state attorney failed to appear, but sent a long, rambling document containing many self-serving statements. But it also contains sufficient to indicate blatant solicitation by him of retainers from the plaintiffs herein³⁸ which transcended ethical standards,³⁹ if not statutory prohibitions.

The courts would be derelict if they supinely stood by, aware that improper practices had flooded their dockets with litigation that truly belongs in another forum. The courts have 'inherent power to protect [themselves] from a deluge of litigation by nonresidents, inspired by contingent retainers to avoid or overcome foreign laws and interpretation and application thereof by foreign courts * * *'.⁴⁰ Thus, the circumstances which lead to the retention of plaintiffs' lawyers in this district and the consequent filing of the actions here give added reason for declining."

Furthermore, the above cited case which is more fully discussed in defendants' brief is very much on point with the matter here at bar.

21. In summary, it is clear, based on plaintiffs' own affidavits that there is absolutely no contact of any nature between these actions and New York other than the presence of plaintiffs' attorneys. On the other hand, all the contacts in this matter lead one to England where Mr. Hummel himself had to perform his investigation.

Texaco Defendants' Counsel Mr. Stern's Reply Affidavit

WHEREFORE, it is respectfully requested that:

(1) This action be dismissed as to TEXPAN on the ground of *forum non conveniens* subject to whatever conditions this Court considers proper under the circumstances here present;

(2) Summary judgment be granted dismissing this action as to TEXACO INC. for failure to state a claim upon which relief could be granted; and

(3) Such other and further relief as the justice of the case may require.

/s/ ALVIN L. STERN
Alvin L. Stern

Sworn to by Alvin Stern
8th day of January, 1974.

Exhibit A—Annexed to Foregoing Affidavit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

♦
[SAME TITLE]
♦

KINGDOM OF ENGLAND }
CITY OF LONDON } ss.:

I, Captain John L. Watson of Flat 2, 7 Woodville Gardens,
Ealing London W5 make Oath and say as follows:

1. In January 1971 I was Manager, Operations Department for Texaco Overseas Tankship Limited ("TOT") and had held this position with the Company and its predecessors since 1952. I commenced my career at sea in 1925 and I hold a British Extra-Master's Certificate which I obtained in 1938. Between 1942 and 1950 I served with the British Ministry of Transport (now the Department of Trade and Industry) as a Nautical Surveyor and Examiner of Masters and Mates. As Manager, Operations Department, I was directly responsible to the Managing Director of TOT for the day-to-day operation of the various vessels owned by the Company, and for vessels managed by them.

2. In this capacity, I was primarily responsible for the work performed by the Company in connection with the collision between the "TEXACO CARIBBEAN" and the "PARACAS" on 11th January 1971 and the subsequent events thereto. I make this Affidavit in support of a motion seeking to dismiss the present action and in reply to an Affidavit

Exhibit A—Annexed to Foregoing Affidavit

of Mr. Werner Hummel sworn to the 16th day of May 1973 relating to negotiations for the hire of the tug "BEVER" owned by Smit Tak of Rotterdam and submitted in opposition to this present motion seeking to dismiss this action on grounds of forum non conveniens. In doing so, I have referred to TOT's records of events including records prepared by me concurrently with those events.

3. First, however, I should mention more precisely the arrangements between my Company and Texaco Panama Inc. ("Texpan") the Panamanian corporation which actually owned the "TEXACO CARIBBEAN". Texpan owns a number of tankers, the management of which is primarily vested in TOT under the terms of a Management Agreement dated 26th August 1970. This Agreement is in a form which is customary as between shipowners and ship managers, and there-under very wide powers were delegated by Texpan to TOT, including power to handle all claims and deal with all casualties of whatsoever nature. It follows from the Agreement that if a casualty occurs to a vessel such as "TEXACO CARIBBEAN" TOT is empowered, without further authority, to take all steps necessary to protect Texpan's interests.

4. Accordingly, when the Directors of TOT were informed of the collision between the "TEXACO CARIBBEAN" and the "PARACAS" in the early hours of 11th January 1971, all appropriate arrangements were made by TOT personnel in London without immediate reference to New York. These steps included the despatch of personnel from TOT's London office to Dover, where survivors from the casualty were being brought ashore, communication with Trinity House, with Lloyds Intelligence, with the Department of Trade and Industry in London, with our Solicitors, and with the

Exhibit A—Annexed to Foregoing Affidavit

Monaco office or TOT primarily responsible for the crewing of Texpan vessels.

5. The initial collision between the "TEXACO CARIBBEAN" and the "PARACAS" occurred at approximately 0400 hours On January 11th 1971. As can be seen from the above TOT had no need to seek instructions or authority from any other company or person in relation to the manner in which to deal with the casualty or the events subsequent thereto.

6. During 11th January, our primary concern was, naturally, the care of the survivors and the search for missing crew members. We were aware of the fact that the forward section of the vessel had sunk, and that the stern half had remained awash, finally sinking at about 1400 hours on 11th January. We were also aware of the fact that the wreckage of the vessel might be a hindrance to navigation, and all appropriate steps to avoid the consequences of this were taken. We were also aware of the possibility of the fuel oil on board the vessel leaking and causing pollution problems, and further, **we were anxious to learn whether** there was any possibility of any part of the vessel being saived.

7. My contemporary notes confirm that between noon and 1230 hours on Wednesday 13th January, *the day after the sinking of the "BRANDENBURG"*, I was in touch with Mr. Mitchell of Smits with a view to engaging the "BEVER" for an inspection of the wreckage. This was the first time I had had any communication with Smits concerning the initial collision or events subsequent thereto. I was quoted a rate of £500 per day for the services of this vessel which was later confirmed by Smit by telex, the offer to remain open

Exhibit A—Annexed to Foregoing Affidavit

until 1600 hours on that day. My notes makes no mention of my having stated—and indeed I would have had no occasion to state—that the engagement of the vessel would be subject to approval from New York although as I had further enquiries to make, I undoubtedly told Mr. Mitchell that I would contact him later to say whether his company's offer would be acceptable because I considered the rate quoted to be high. I may have added that I would refer the matter to my Managing Director who was, of course, very much involved with all these matters.

8. My notes then record that at 1430 hours on the same date I telephoned Mr. Crothall of Messrs. Risdon Beazley in Southampton, and I asked if his company could supply an appropriate tug, and asked him to quote a rate. He telephoned at 1450 hours to say that their vessel "QUEEN MOTHER" could be made available the following day at a rate of £180 per day, and I immediately accepted this offer on my own initiative without reference to higher authority, and requested that appropriate arrangements be made without delay. The arrangements were confirmed in the form of a formal telex proposal from Risdon Beazley to TOT's office, which TOT then accepted by a telex timed at 1708 hours. My records also show that at 1710 hours I had advised Smits that their offer was declined.

9. I confirm again that TOT had full authority under the terms of the Management Agreement to effect all arrangements without reference to anyone in New York or any other place.

SWORN at 5, Fenchurch)
Street, London, England)
this twenty-first day of)

December 1973)
Before me,)
J. L. WATSON

Exhibit A—Annexed to Foregoing Affidavit

GREAT BRITAIN AND NORTHERN IRELAND	} ss.
LONDON, ENGLAND	
EMBASSY OF THE UNITED STATES OF AMERICA	

I, Micaela A. Cella, Vice Consul of the United States of America residing at London, England, duly commissioned and qualified, do hereby certify that

JAMES MALCOLM WAUGH

whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof a Notary Public at London, England, duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said

JAMES MALCOLM WAUGH

on the annexed certificate with a specimen of his signature filed in this Embassy, that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

Exhibit A—Annexed to Foregoing Affidavit

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this Twenty-first day of December in the year of Our Lord one thousand nine hundred and seventy-three.

/s/ MICAELA A. CELLA
Vice Consul of the United States
of America at London, England
Service Receipt No. C0876699
Tariff Item No. 48
Fee: \$2.50 = £1.08

[SEAL]
LND/125
Apr. 72.

331a

Exhibit B—Annexed to Foregoing Affidavit

(Letterhead of Stocken & Company)

STOCKEN & COMPANY
Solicitors
Commissioners for Oaths
45 Laurence Pountney Lane
(Off Cannon Street)
London E.C. 4

4th December, 1969

Exhibit B—Annexed to Foregoing Affidavit

- (d) Discovery and Inspection of documents (this is flexible and the time prescribed is under the Order for Directions made after the Joinder of Issue. This is normally completed in 6/8 weeks).
- (e) After completion and discovery of inspection a date for the hearing is fixed subject to the availability of dates as per Courts Lists.

It is right to point out that the normal never applies and in a matter of this nature experience and practice shows that a hearing to be completed after the issue of the Writ of Summons would take approximately 2 years. If, however, tactics or other considerations demanded a speedier trial it would be possible to have the matter determined in say, 12/18 months.

The considerations applying are probably the same as your own i.e. the difficulties of obtaining proofs of evidence; whether it is prudent to rush the matter; the thorough marshalling and knitting together of the evidence; the tactics of speed or delay. These are matters no doubt common to similar considerations in litigation in the States. To sum up however, we consider that if a speedy trial was required, and the considerations so warranted it, before the end of 1970 it could, with some goodwill on the part of the other side, be achieved. We say goodwill from the other side as professional advisers as distinct from clients are called upon from time to time to grant extensions to and to accommodate in part their professional brethren.

6. COSTS:

You are probably now aware that it is possible in the United Kingdom, which was previously not applicable, to

Exhibit B—Annexed to Foregoing Affidavit

take a matter upon a contingency basis. In recent matters where we have acted for American professional brethren it has been proposed to us that we should act upon a contingency. If, having considered this opinion and having had the benefit of your own view, our mutual clients consider that a contingency arrangement would suit or ought to be agreed we would have no objection to such an agreement.

As we understand the contingency provisions in your country it is not uncommon for insurance interests to wish to know their liability to their clients at an early stage and this is not an easy

**Vessel and Cargo's Letter to Metzner, J. of 14 Jan 1974
(with Copy to Magistrate Jacobs) Regarding False
Sworn Statements by Texaco Defendants, with
Attached "Appendix of Important
Misrepresentations"**

January 14, 1974

BY HAND

Honorable Charles M. Metzner
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

Thomas I. Fitzgerald, as Public Administrator
v. Texaco, Inc. and Texaco Panama, Inc.
72 Civ. 5008 and Consolidated Cases
72 Civ. 5009-10, 73 Civ. 92-99, 117
162 and 182

Your Honor:

Texaco defendants' reply papers dated January 8, 1974 contain a completely false sworn statement so central to this dismissal motion that we must in justice to our clients point it out to Your Honor. Texaco defendants' false statement is that "... the first communication between Smits and TOT took place on *January 13th not January 11th* ... and ... dealt with an offer for salvage *after the sinking of both the BRANDENBURG and TEXACO CARIBBEAN* and not with any attempt to locate, mark or buoy the wreck of the *TEXACO CARIBBEAN*".¹

1. Affidavit of Alvin L. Stern, Esq., dated January 8, 1974, p. 4.

*Vessel and Cargo's Letter to Metzner, J. of 14 Jan 1974
(with Copy to Magistrate Jacobs) Regarding False
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Misrepresentations"*

The fact is that the Smit salvage vessel Orca—the same vessel which subsequently located the two wrecks of the Texaco Caribbean and the wreck of the Brandenburg all *within a half hour* of her arrival at the scene of the casualty²—was offered to Texaco defendants' Mr. Loker in London on *January 11th at 10:30 A.M., in order to locate the position of the wreck and warn passing vessels.*³ This offer was made less than seven hours after Texaco Caribbean's explosion, and *twenty-one hours before* the Brandenburg run upon the unlocated and unbouyed wreck of the Texaco Caribbean's stern section.

TEXACO DEFENDANTS' ASSERTION HAS NO SUPPORT.

The assertion that the salvage company's offer was two days later than stated by plaintiffs is said by Texaco defendants to be made "clear"⁴ by the affidavit of Captain Watson. Captain Watson's carefully drawn affidavit, if equally carefully read, does *not* contradict Mr. Hummel's affidavit, nor does it support the false statement by Texaco defendants.

Mr. Hummel stated that "... on the morning of January 11, 1971, the ocean towage and salvage firm of Smit-Tak, Rotterdam, offered to the Texaco Caribbean Interests the services of their wreck-searching vessel 'Orca' . . ."⁵

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2. P. 3, Affidavit of W. Hummel (attached as Exhibit A to Affidavit of M. Deming, dated December 19, 1973, in opposition to Defendants' motion).
 3. Hummel Affidavit, p. 2; Deming Affidavit, p. 3.
 4. Note 1, *supra*.
 5. Hummel Affidavit, p. 2.

*Vessel and Cargo's Letter to Metzner, J. of 14 Jan 1974
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Captain Watson does *not* contradict this. He says only that *HE* personally had no communication with Smits until January 13th.⁶

The fact is that the offer regarding the Orca was received—early on January 11th, just as Mr. Hummel states—by Texaco defendants' Mr. Loker, not by Captain Watson.

Texaco defendants have scoffed⁷ at the telex excerpted as Exhibit B to Mr. Deming's affidavit. Plaintiff Hapag-Lloyd is pleased to attach to this letter the original of that telex, and copies thereof for reference by counsel.⁸ It shows that Mr. Hummel, as stated in his affidavit⁹ had confirmed directly with Smit prior to April 4, 1973, the date of the telex, that *two* offers of *two* separate vessels had been made to Texaco defendants—of the Orca, to Texaco defendants' Mr. Loker at 10:30 A.M. on January 11, 1971; and of the Bever, to Texaco defendants' Capt. Watson at noon on January 13, 1971. Both offers were refused.

Texaco defendants' false assertion goes to the very heart of this litigation in general, and of this dismissal motion in particular.

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6. Regarding the Jan. 13th Bever inquiry, Capt. Watson states only that "This was the first I had had any communication with Smits concerning the initial collision or events subsequent thereto," Watson Affidavit, pp. 3, 4. (*emphasis supplied*).
 7. Stern Affidavit, p. 4.
 8. The names of Smit personnel have been deleted from counsel's copies. A specimen of the telex as sent to counsel is attached for the Court's file.
 9. Hummel Affidavit, p. 2.

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THE ESCAPE FROM LIABILITY SOUGHT BY TEXACO
DEFENDANTS UNDER COVER OF THEIR FORUM
NON CONVENIENS MOTION.

The reason allegedly given to Smit by Texaco defendants in refusing the Orca—"OFFER WAS REFUSED AS TRINITY HOUSE ALLEGEDLY HAD TAKEN OVER MATTER ALREADY"¹⁰—dramatically highlights both the cause of Texaco defendants' no-holds-barred dismissal efforts, and the compelling reason, under the *Chemical Carriers* and *Gulf Oil* cases¹¹ (loss of plaintiffs' remedy) which warrants retention of plaintiffs' actions here.

Under the *United States* admiralty rule, which this Court would apply to a high-seas collision,¹² plaintiffs have a remedy. Under the *English* rule, which would be applied by English courts, they have none.¹³ The *English* admiralty rule—that once a governmentally authorized body such as

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10. First paragraph of telex dated 4.4.73 18.14 from Hapag-Lloyd AG to Messrs. Haight, Gardner, attached hereto.
 11. Plaintiffs Hapag-Lloyd *et al.*'s Brief in Opposition of Dec. 10, pp. 6-7; Deming Affidavit, pp. 12, 13.
 12. *Appendix of Important Representations*, Misrepresentation III. Texaco defendants' reply papers contain a series of important misrepresentations of the relevant law and facts, as well as the false assertion discussed in this letter. Plaintiffs attach to this letter an Appendix concisely describing each such misrepresentation, with citations.
 13. Plaintiffs Hapag-Lloyd, *et al.*'s Brief in Opposition, pp. 6-7; Appendix *supra* note 12, item no. 4.

*Vessel and Cargo's Letter to Metzner, J. of 14 Jan 1974
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Misrepresentations"*

Trinity House¹⁴ is given mere notice of a wreck, the wreck's owners are relieved of further obligations¹⁵—is the rule Texaco defendants seek. The *United States* rule in admiralty—that the owner of a wrecked vessel endangering navigation has a non-delegable duty to locate her which continues, despite governmental efforts at location, until the wreck is actually located¹⁶—is the basis of plaintiffs' suits.

When the *Brandenburg* ran upon the stern section of the Texaco Caribbean approximately 27 hours after the Paracas/Texaco Caribbean collision, the stern section was unbuoyed and unlocated by either Trinity House's Siren, then anchored over a mile away from the wreck¹⁷, or by Texaco defendants or anyone else. Under the British rule, Texaco defendants are likely to escape liability—even though failing themselves to hire the Orca or take any other action resulting in location of their dangerous wreck—on the basis of their mere notice to Trinity House, no matter how unavailing the Siren's activities; under the United States rule, however, Texaco defendants cannot delegate their duty to locate, and will be found liable to plaintiffs, without limitation, if found negligent in the performance of their continuing duty to locate.

It results that if sent to England, these plaintiffs lose the cause of action they have in this Court. It is the lesson of *Gulf Oil and Chemical Carriers* that under these cir-

14. For citation of the English statutes demonstrating this authority, contrary to Texaco defendants' misrepresentations, see Appendix *supra* note 12, item no. 4.

15. Plaintiffs' Hapag-Lloyd *et al.*'s Brief in Opposition, pp. 6-7; Deming Affidavit, pp. 12, 13.

16. Plaintiffs' Hapag-Lloyd *et al.*'s Brief in Opposition, pp. 7-8; Deming Affidavit, p. 13.

17. Deming Affidavit, pp. 5, 6.

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cumstances, even if there were a balance of convenience
onerous to Texaco defendants¹⁸, this could not justify dis-
missal, since dismissal would result in denial of the plain-
tiffs' remedy. Texaco defendants' false assertion should not
be allowed to affect application of these principles.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By

MD:MS

MACDONALD DEMING

Attorneys for Plaintiffs Hapag-
Lloyd, Stork Amsterdam N.V. *et al.*

cc: By Hand

Martin D. Jacobs, United States Magistrate
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

By Hand

Poles, Tublin, Patestides & Stratakis
Thirty-Seven Wall Street
New York, New York 10005
Attention: Alvin Stern, Esq.

By Hand

Fuchsberg & Fuchsberg
250 Broadway
New York, New York 10007
Attention: Harvey Goldstein, Esq.

18. Which plaintiffs deny; see item I of Appendix *supra* note 12.

*Vessel and Cargo's Letter to Metzner, J. of 14 Jan 1974
(with Copy to Magistrate Jacobs) Regarding False
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Appendix of Important Misrepresentations

MISREPRESENTATION I

"... the records, facts and witnesses with regard to what plaintiffs have previously called 'the central merits issue' all lie in England or otherwise outside of the United States." [Affidavit of Alvin L. Stern, Esq., dated January 8, 1974 (hereinafter "Stern Affidavit"), p. 2].

"... all key and mandatory witnesses, records and testimony lie in England or places outside of the United States." (Stern Affidavit, p. 2).

Defendants' statements are plain misrepresentations of the facts. The central merits issue is the failure of Texaco defendants to fulfill their non-delegable duty under the general maritime law, as applied in United States courts of admiralty, to locate the wreck of the Texaco Caribbean upon which the Brandenburg and her cargo ran and were lost on January 12, 1971.

The m/v Leslie Lykes is a vessel of American ownership, registry, home port and crew. A copy of her crew list is attached, showing that her entire crew are United States residents, and that *two of the vessel's crew live in New York* (crew members Kelly, F. and Berwood, R.). The Leslie Lykes stood by the floating unmarked stern section of the Texaco Caribbean from approximately 0700 to 0830 on Monday, January 11, 1971. (A copy of the vessel's log for that day is attached hereto.) Practically her entire crew are key witnesses to the fact that the wreck might at that time have been easily marked. The "records, facts and witnesses" which can be produced and/or proved by Leslie Lykes and her crew will undeniably be obtained most easily in the United States.

*Vessel and Cargo's Letter to Metzner, J. of 14 Jan 1974
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Sworn Statements by Texaco Defendants, with
Attached "Appendix of Important
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Additionally, Texaco defendants have themselves admitted that defendants' representative H. R. Cristensen, who resides in Ridgewood, New Jersey, received communications regarding location, marking or removal of the wreck. (Defendants' Answers to Interrogatories, pp. 3, 4, dated Oct. 5, 1973).

MISREPRESENTATION II

"The American cases cited by plaintiff are concerned with the application of the Wreck Statute 33 U.S.C. [sic] . . ."

* * *

"The Wreck Statute could not be applied to a foreign ship owner with respect to a wreck in the English Channel, resulting from a collision between two foreign vessels . . ." (Stern Affidavit, p. 12).

Defendants' statements blithely ignore their general maritime law duty, and plainly misrepresent plaintiffs' position.

Plaintiffs have never and do not now claim that the Wreck Statute, 33 U.S.C. §409 (1970), applies to the Texaco defendants' high seas negligence. Texaco defendants' failure to locate and mark the wreck of the Texaco Caribbean is actionable under the general maritime law, as enforced in United States Courts of Admiralty, which imposes a duty upon the owners of a wreck vessel endangering navigation to locate and mark her, in whatever waters she may lie.

The Wreck Statute is "... but declaratory of the general maritime law * * * and without any statute the law lays this obligation upon every owner who does not abandon a wrecked vessel". *The William Nelson*, 296 F. 553, 556 (E.D.N.Y. 1923).

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"But without any statute the law lays this obligation [to buoy a wreck in navigable waters] upon every owner who does not abandon a wrecked vessel." *The Plymouth*, 225 F. 483 (2 Cir., 1915)

MISREPRESENTATION III

"In any event, under all known principles of Conflict of Laws, English law would have to be applied to the case no matter which forum it is tried in." (Stern Affidavit, p. 12).

Defendants' statements are plain misrepresentations of the law which would be applied by a United States Admiralty Court to judge the claims of plaintiffs Hapag-Lloyd, and of Stork Amsterdam N.V. *et al.*

The claims of plaintiffs Hapag-Lloyd and Stork Amsterdam N.V., *et al.*, are for loss of ship and cargo arising out of a collision on the high seas between vessels of different flags.

"... it has been the law of this country, at least since *The Scotland*, 105 U.S. 24, 30, 26 L. Ed. 1001, that in such a situation the law to be administered is 'the law of the forum, that is, the maritime law as received and practiced therein, would properly furnish the rule of decision' ". *Kloeckner Reederi v. A/S Hakedal*, 210 F. 2d 754, 756 (2 Cir. 1954), *cert. dismiss.*, 348 U.S. 801 (1955).

MISREPRESENTATIONS IV & V

"The English cases cited by plaintiff stand for the proposition that once a governmental department (Trinity House is not a governmental department) assumes *ownership* or *possession* of a wreck, the original owner is relieved of liability provided

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they have not been guilty of willful misconduct or neglect." Stern Affidavit, p. 11.

This statement combines two plain misrepresentations, one of fact (that Trinity House is not governmentally authorized to locate wrecks) and one of law (that other than mere notice to the appropriate authority is required under English law to relieve a wreck's owners of further responsibility.)

As to MISREPRESENTATION IV, Trinity House is the sole organization statutorily empowered by English law to deal with wrecks on the high seas adjacent to English territorial waters. Under section 634 of The Merchant Shipping Act, 1894, Trinity House is constituted the "Lighthouse Authority" "throughout England and Wales and the Channel Islands and the adjacent seas and islands". Section 531 of the same Act provides:

"Where any vessel is sunk, stranded or abandoned in any fairway or on the sea shore or on or near any rock, shoal or bank in the British Islands or any of the adjacent seas and islands and there is not any harbour or conservancy authority having power to raise, remove or destroy the vessel the general lighthouse authority for the place in or near which the vessel is situate shall, if in their opinion the vessel is, or is likely to become, an obstruction or danger to navigation or to lifeboats engaged in the lifeboat service, have the same powers in relation thereto as are by this part of the Act conferred upon a harbour or conservancy authority."

A harbour or conservancy authority is given powers under Section 530 of the Act to:

"(a) Take possession of and raise, remove or destroy the whole or any part of the vessel; and

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(b) Light or buoy any such vessel or part until the raising, removal or destruction thereof. . . ."

As to MISREPRESENTATION V, under the English cases *mere notice* by the owner of a wrecked vessel to the appropriate authority (in this case, Trinity House) is said to relieve them of further responsibility.

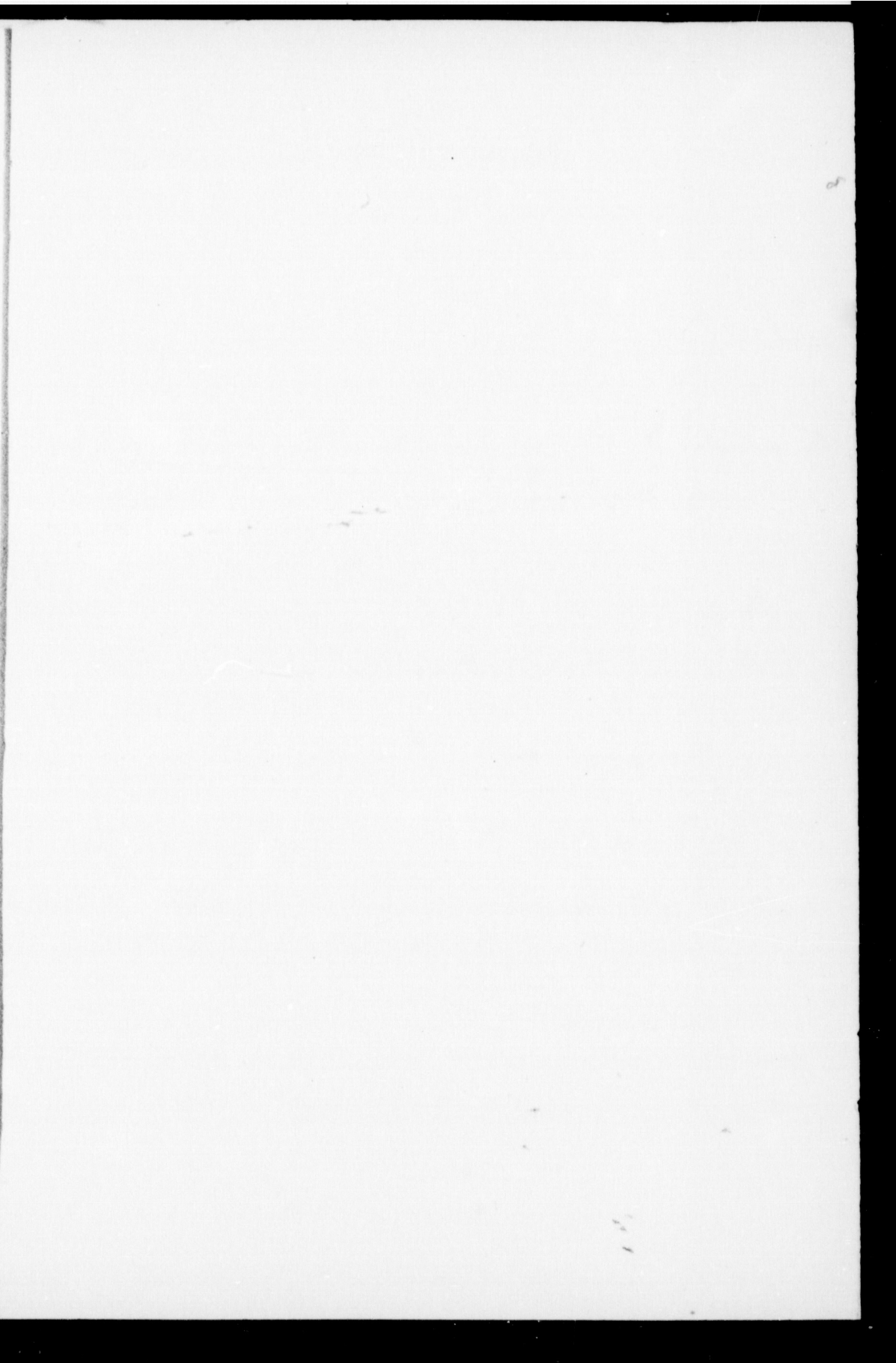
In *The Douglas* [1882] 7 P.D. 151, the Douglas sank in the Thames, endangering navigation. Her mate sent a message to the Harbor Master about the sinking, and the Harbor Master stated he would mark the wreck with lights. A few hours later another vessel struck the Douglas's wreck, still unlit. The Douglas' owners' were exonerated by the Court as follows:

" . . . the collision was reported to the harbour-master, and . . . the [Douglas'] mate did receive a communication from the harbour-master. This circumstance exonerates the defendants from the charge of negligence, *for it gave the harbour-master notice to perform the duty.*" 7 P.D., at p. 161. (*emphasis supplied*).

Thus, under English law, Texaco defendants would evidently escape liability merely by having given notice to Trinity House. Plaintiffs if sent to England, would thus lose the causes of action they have in this Court.

Crew List

(*Mounted Opposite*)



Sheet No. 1

PASSENGER LIST
CREW LIST
(Cross out one)

Class STEAM PASSENGER
(First, Cabin, Tourist or Other)

CARRIER AMERICAN STEAMSHIP LINE LINES OFF#257416 VOY#14
(Nationality, name, and official No. of carrier)

Date of arrival/departure 12/16/70 Port of arrival/departure HONOLULU
(Cross out one)

Last foreign port before arrival in United States

(Place and Country)

(Date departed)

(1) NAME IN FULL		(2) Nationality and passport number	(3) CREW		(4) Crew (departing U.S. Flag Vessels only) USCG Z or C.D.B. No. and Name and Address of Next of Kin	(5) This column for use Government officials only (except when carrying certain pas- sengers. See Instruc- tions)
Family Name	Given Name and Middle Initial		Position	Where shipped or engaged		
LIC#365907, MASTER JAMES	427 05 2993 FRANK H.	N.Y. USA	(55)1/28/15 MASTER	HOUSTON TEX.	EX038642, WI: ELIZABETH, 4812 CLEVELAND AVE. N.O. LA. 70119	
LIC#376832, MASTER ORRISON	422 10 9332 THOMAS D.	ALA USA	(51)10/9/18 CH MATE	"	2197477, WI: RAZEL, 3807 TARTAN LAWN, LAFAYETTE, TEXAS 75751	
LIC#395760, 2/MATE KICKS	457 80 3025 MARK R.	TEX USA	(23)5/24/47 2/MATE	"	21166890, PA: EDWARD, 9900 MEMORIAL, AC-20, HOUSTON, TEXAS	
LIC#307235, 2/MATE BALLARD	262 14 9998 WILLIAM	ILL USA	(51)12/10/18 3/MATE	"	2240837, WI: JEAN, 1008 LAUTHER ST N.O. LA. 70116	
LIC#392354, 3/MATE WIRE	457 26 0068 EDWARD H.	OKLA USA	(55)11/29/15 3/MATE	"	2242033, WI: RUBY, 7253, HOLME HOUSTON, TEXAS 77017	
NELSON	495 58 8269 JOHN S.	MO USA	(19)9/18/51 DE CAD	"	Z, PA: FRANCES, 6312 E. 85th ST. BAYVIEW, MISSOURI, 64128	
McOWAN	262 82 4380 COLIN C.	IOWA USA	(21)2/5/49 DE CAD	"	21273039, PA: THOMAS, 6001 N. BROOKLINE, APT 1212, OMAHA, IOWA	
TL81052, R27424 EELWOOD	053 34 9918 RAYMOND P.	ENGLAND USA NAT	(50)10/5/20 R.E.O.	"	21179139, WI: MARTEL, 9824 AVE J. BROOKLYN, N.Y. 11236	
PALMER	21112 7522 HARRY P.	PERN USA	(43)7/15/27 BOSON	"	2473072, SI: MRS. H. LEONARD, 6912 NAVIGATION BVD HOV. TEX	
LARRY GARY	553 20 1379 MAX L.	UTAH USA	(46)3/18/24 DE UTL	"	2184834, WI: ANNA, 18422 MANITABA LANE, HOUSTON TEXAS 77055	
LAFRANCE	439 32 6520 ROY A.	LA USA	(39)2/27/31 AB	"	2992715, MO: IRMA, 2419 DECATUR ST N.O. LA. 70117	
HARRIS, JR.	349 14 2354 WILLIAM	ILL USA	(45)3/10/25 AB	"	21221397, SI: ILAN WILKINSON, 974 E. 6th ST. POMONA, CALIF	
GURSTON	265 28 6830 MICHAEL A.	PA USA	(47)8/30/24 AB	"	2863324, WI: EULEN, 1225 ST. CHARLES AVE. N.O. LA. 70130	
WOODS	437 14 2288 LLOYD J.	LA USA	(54)8/4/16 AB	"	295003, WI: GLOEIA, 1126 JACKSON AVE. N.O. LA. 70130	
REIL	042 26 9193 LYMAN W.	OHIO USA	(35)6/11/35 AB	"	21291862, PA: MR. W. HALL, 5648 12th AVE. SOUTH GULFPORT, FLA. 33707	
CHENGSTON	535 30 6396 TERRALL J.	WASH USA	(35)4/2/35 AB	"	2918916, BED: BOB, 1323 13th SOUTH, SEATTLE, WASH	
PERDS	202 22 4053 LUIS P.	P.R. USA	(47)10/10/21 CS	"	2267078, WI: DNEZ, 3300 BURGUNDY ST. APT. C. N.O. LA. 70117	
JOHNSON	499 42 1455 CHARLES H.	ARK USA	(47)6/23/23 CS	"	21207043, SE: JESSIE KOWAL, 1640 TASSAR ST. HOV. TEXAS 77066	
OLYND	436 66 7574 ROLANDO	HONDURAS USA NAT	(35)12/9/34 CS	"	21173295, WI: EITA, 1726 ALVAR ST. N.O. LA. 70117	
LIC#318629, CH ENGR KUSCH	256 24 6738 FRED C.	GA USA	(46)4/30/24 CH ENGR	"	1A295932, WI: CROSBIE, RFL, MAYFIELD, CA. 90543	
LIC#302149, 1/ASST FROTHIER	006 44 6470 LEONARD FROTHIER	HAINE USA	(25)6/12/45 1/ASST	"	21222674, WI: IREDA, 3301 GARDEN CART DR. N.O. LA. 70114	
176014473, 2/ASST TAYLOR	423 18 0604 J. V.	ALA USA	(40)11/29/21 2/ASST	"	21107131, WI: KUNA, P.O. BOX 45 ANDERSON, ALA. 36606	
LIC#100003, 3/ASST CHOI	434 70 2737 JOHN H.	LA USA	(22)12/15/47 3/ASST	"	21234006, WI: MARY, 1207 12th ST. N.O. LA. 70117	
LIC#100002, 2/ASST W. J.	450 76 1463 EDWARD E.	CALIF USA	(21)4/3/47 2/ASST	"	2909379, LA: BOY, 4043 BURGUNDY ST. N.O. LA. 70117	
LEE	258 24 6042 LEONARD	OHIO USA	(29)2/12/41 DE CAD	"	Z. LA: ELEANOR, 3043 WILSON ST CHICAGO, ILL. 60640	

FROM

ANTWERP

TO

 $L \in H_{1,2} \vee R \in$

	GYRO	G.E.	ST'D	DEV.	VAR.	STEER	WIND	FORCE	BAROMETER	AIR	WATER	RPM	SEA
00	0000. VESSEL IDENTIFIED AS BECALM IN FLE WIND OBSERVED												
01	0354 FOG CLEARING COMMENCED HEADING 110												
02	SSC 5 BUCKLE 41												
03	1105 ANCHOR DOWN ANCHOR CLEAR WATER SEA SPEED FROM G.W.F. NORTH FORELAND RADIO EST. REGARDING ANTERIOR COLLISION												
04	5100N 0120E FOLLOWED BY WIND COLLISION 0427 S FINEY BARK BOUY @ 10 MESSAGES ALSO FROM "G.W.F." GIVING ADDITIONAL DETAILS REGARDING THE COLLISION DOES NOT WARRANT AN INCREASE TO MAXIMUM SPEED. 0459 SANDTTS AIRSABLE RECEIVED FIRST POSITION OF THE TETRAO (ARRIVAN CON FIRM)												
05	TRACK LINE 0557 S. FINEY BOUY @ 10 STD. 1.0 mi off by Radar 1/2 230° P.B.C. 1/2 230° P.B.C. 1/2 1/2 S.R.F. ENTERING COLLISION AREA SPEEDS AS FOLLOWS												
06	44 Radar 0637 MAXIMUM SPEED 0638 1/2 210° P.B.C. 0641 SIGHTED 4 SPOTS ON STD. BOUY AND CONTINUED MANEUVERING TO APPROACH. NO												
07	CLEARLY VISIBLE NO SIGN OF LIFE OR ACTIVITY ABOARD. LIGHTS STILL FUNCTION FORWARD OF THE AFTER HOUSE ABOVE WATER RUDDER AND PROPELLER CASES												
08	RADIO WITHOUT SUCCESS MIDVANE BOUY 1.1 mi off @ 044° P.B.C. DRIFT												
09	DRIFTING WRECK ESTABLISHED THE CONTACT WITH RESPECT TO 1300NITABLE												
10	LOOKING WRECK. SEARCH LIGHT BEAMS DIRECTED TOWARDS WRECK AND SKY.												
NO CES BULLY BARK LT RD TO G.W.F. 1/2 1/2 OFF - 0415 BISSURELLE W/ AIR TO PLT 1/2 1/2													
1200 214 310 1/2 1/2 1/2 1/2													

	LATITUDE	LONGITUDE	COURSE	DISTANCE	TOTAL DISTANCE	LENGTH DAY	AT SEA
	ANTWERP TO L'Harpe		VAR	16.6	16.6	8 ^h 57 ^m 13 5 ^h 15 ^m	10.8 0°
12	1202 CAPT. ANTIFER LT. C 3.0 N					312 P.M. 11 ^h 15 ^m	
	1349 PILOT L'ALEXANDER H. BOHAR					PIREEDING IN	
13	1421 APP. IS EIGHTH. 1433 FIRST LINE					NOT LAND. 14 ^h 50 ^m	
	2102 TO FLORIDE ²						

[illegible]

1625 ROBERT G ROBERT, SUTL 2-117-97-6600 Sent Ashore To Chicago
AMBULANCE LEFT SHED IN STREET

[illegible]

1900	SECRET	6	ROBERTS	RETURNED TO	WASCO	NEVER	OWN	TOWER
------	--------	---	---------	-------------	-------	-------	-----	-------

2000 frequent inspections made about wells, ditches and gullies.

[illegible][illegible]

2400 View idia - Faint infection made about dick - Linet young Tudi - All
REMARKS:

REMARKS:

'520 VESSEL (LEAKED). SHORE LANE C. N. D. N.

1520 Road all around 11th side to Florida #2. 7.5.19

1622 Das Keltische Wörterbuch für die deutsche Sprache. 1821

less than 1/2 inch, & large & small complete infection of all nests of insects that

1500 Campbell's infection of cell & sing. cond. p. for made, labor, stock & supply

ES17D, #517D, 48 ft. #5 pipe and all found valves in good order and
1st and 2nd 1/2" dia.

1891

ZONE -1 DATE MONDAY JANUARY 11, 1971

SWELL	WEATHER	VISIBILITY	VESSEL MOVEMENTS
-------	---------	------------	------------------

7 HINDER 4/10 040 DIST. 1.5 m. HLL RECULATIONS

WINDIC.

CLEAR

6000

W.B. Clark 3/1

0425 RECEIVED DISTRESS MESSAGE

IN VICINITY VARNÉ BASIN POSITION

STN. CLOSE AHD 0620 P.G.C. 0456 RECEIVED

POSITION 150N THIS VESSEL'S TRACK, BUT VISIBILITY

1/2 @ 11 mi off by radar 0625 P.G.C. 0529 ANOTHER

6 THE LOCATION DIRECTLY ON THIS VESSEL'S

0609 S.600WIND SANDS 1/2 @ 300 P.G.C. 7.7 mi off by RADAR

0611 BRCK 0629 VARNÉ 1/2 @ TO PORT 0.9 mi off

W. RICK TEXACO CARIBBEAN APPROXIMATELY 2 mi. OFF

NO OTHER VESSELS IN SIGHT AT SCENE 0644 WRECK MORE

STERNING WESSEL WELL DOWN BY THE HEAD WITH NOTHING

0646 COMMENCED USING VHF CALLING NORTH FORLANDA

TO STN. MANEUVERING ABOUT SAME 0654 1/2 BEGIN

0654 1/2 REQUESTED WE ILLUMINATE TO ASSIST HIM IN

WARD. - SEE OPPOSITE PAGE -

0655 - Pilot training - turned to follow -

SEA AVERAGE TOTAL AVEG. RPM DIST. ENG. SLIP FUEL CONSUMED FUEL REMAINING

0655 17.78 17.78 7525 180 277 155 18091

LE HAVRE N.W. WRECK 1500 @ TO PORT.

1014 ENTER HARBOR. 1417 TUG 23 FWD. A 27 AFT.

TO TUGS HAWK 1500 F.W.C. 1530 HLL FAST STD.

W. Ballant 3/1

Primary Inspection.

THE SCANDINAVIAN AGENCY (AUBAN) TAKEN IN RETURN

Fixed all in apparent good order

M.S. L. 1/1

in apparent good order

046 1/1 3/1

ENTERED.

ARKL 1/1

LE HAVRE

F 12-04 F

A 12-10 A

M 14-01 M

F 1242/BLS F

W 111 TONS W

F

A

M

F

W

TONS

TONS

RUNNING LIGHTS:

TO

TO

OTHER LIGHTS:

ANCHOR, DECK

0000 TO 0405

TO

TO

TO

TO

TO

TO

TO

TO

full on, must shut off.

1/1 1/1 1/1

1/1 1/1 1/1

1/1 1/1 1/1

1/1 1/1 1/1

1/1 1/1 1/1

1/1 1/1 1/1

11			
12			
13			
14			
15	0700 (approximate) ¹¹⁴⁵ TUG INMONTABLE(?) CONFIRMED SIGHTING FOR ILLUMINATION AND IT WAS		
16	EXCEPTED IN STARBOARD SIDE OF ENGINE ROOM, LIT VISIBLE INSIDE HULL THROUGH		
17	AFTER DECK HOUSE. WRECK LAYING WITH BOW AND FWD. HOUSE SUBMERGED AND WITH AN		
18	OTHER VESSEL INVOLVED "PANDA CAS" NOT OBSERVED AND VHF TRAFFIC INDICATED		
19	VHF TRAFFIC CONDUCTED WITH DOVER LIFEBOAT STATION WHO ALSO ADVISED		
20	0720 TWO TUGS CASERED VERY CLOSE TO 2R ALONGSIDE TEXACO CARIBBEAN		
21	CONSIDERED VESSEL RELEASED. LACK OF INFORMATION REGARDING POSITION OF F		
22	OF POSSIBLE DAMAGE TO THIS VESSEL BY CONTACTING SUNKEN PORTION OF TANK		
23	ACCIDENT SCENE EXPEDITIOUSLY. 0748 FULL AHEAD, RESUMED SEA SPEED AND		
24	SBE. CLEAR OF COLLISION SCENE. NO DANGER FROM TRACK INVOLVED TO		
25	0800 210 211 WIND SE 5 kts 40/52 sea 4/4 Sea 7/10 SE 1/2		
1			
2			
3	1530 1 CRANE OPEN TO L.H.	1530 1 CRANE OPENING + REMOVING DUNNAGE	
4		S/CRANE.	
5	1540 B/D L.H. S/CRANE.	1600 B/L L/H W/SK CHAIN	
6		1730 Shift to L/H SLTD	
7		1850 4/5 R/L FORWARD	
8		1940 4/5 RETURN TO VESSEL RESUME	
9	2300 STEVEDORES NO HATCH CLOSED	2300 STEVEDORES NO HATCH CLOSED	
0			
1			
2			
3			
W.H. # 1		W.H. # 2	W.H. # 3

REMARKS:

Hold Cargo Ventilation in continuous operation throughout the

1600-2000 hrs. No ship's gear used, no mechanical or injuries to 1/2 noted on

PORT

4 HATCH	5 HATCH	6 HATCH
<p> approach to which were observed to have large main CRACK OBSERVED. SABLE LIGHT OBSERVED ON TOP 700 LIST. NO SIGNS OF FIRE OR ACTIVITY OBSERVED FOR VESSELS HAVING DIFFICULTY LOCATING HAZ. CRACK TROUBLE OBTAINING INFORMATION. 30/2 BASIS OF MESSAGE FROM GNF/06222 SECTION OF TEXACO CARIBBEAN AND FEAR AS CONTRIBUTING FACTOR IN DEPARTING FROM CA. PASSAGE TO LEHARVE 0754 DISMISSED ATTENTION 1100 30 MIN (W/1 FIVE CLASHES) 4/4/60 VISIBILITY </p>	<p> 1530 1 GANG OPEN TO REEFERS. </p> <p> 1600 3/4 745 REEFERS W/2K CLASH. </p> <p> 2230 FD LEHARVE CARGO ON PORT SIDE - REEFER CLOSED & DECKED - CHENG NOTIFIED - STEVEDORES R.O. HATCH CLOSED </p>	<p> 11/15/60 </p>

W.H. #4		W.H. #5					W.H. #6				
		BILGES / M					LOOKOUT				
		NO	P	S	-	S	HOURS	WATCHMEN	HOURS	LOOKOUT	WAT.
		1	0			0	00-01	COURSLN FWD			
		2	1	1	1	1	00-02	WOODS 19F			
Temp. °F Port Engine		3	1	2	1	2	01-03	CALINIL 2 FWD			
		4	1	4	1	4	02-04	COURSLN 19F			
1200 20°		5	0	1	0	1	03-04	WOODS FWD			
							0500	La Fosse			

**Vessel and Cargo's Letter to Magistrate Jacobs of 14
Jan 1974**

January 14, 1974

BY HAND

MARTIN D. JACOBS, United States Magistrate
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

THOMAS I. FITZGERALD, as Public Administrator v.
Texaco, Inc. and Texaco Panama, Inc.
72 Civ. 5008 and Consolidated Cases
72 Civ. 5009-10, 73 Civ. 92-99, 117, 162 and 182
Poles, Tublin File 4246-1 and 1A
Poles, Tublin File #12,515 MJT/JJD
Our Files #4246-1 and 1A.

Your Honor:

Judge Metzner has today instructed us that the Original of our letter of today's date with enclosures should have been addressed to you. We now enclose xerox complete copy of telex dated 4.4.73, 18.14. All other enclosures were included with the copy of our letter already delivered to Your Honor.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
By MACDONALD DEMING
Attorneys for Plaintiffs Hapag-Lloyd,
Stock Amsterdam N.V. *et al.*

MD:bjj
Enc.

**Death Claimants' Surreply Affidavit in Opposition to
Texaco Defendants' Motion to Dismiss**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

72 Civ. 5008 CM (and consolidated cases) 72 Civ. 5009 and
5010 73 Civ. 92, 93, 94, 95, 96, 97, 98, 99, 117, 166 and 182.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HARVEY GOLDSTEIN, being duly sworn, deposes and says:

Deponent is the attorney for the families of the twelve deceased officers and seamen of the "Brandenburg", and is fully familiar with the pleadings and proceedings heretofore had herein.

This affidavit is submitted in surreply to the affidavit of Alvin L. Stern, and in opposition to the defendants' motion to dismiss.

Since, as the Court now knows, deponent is joined by MacDonald Deming of Haight Gardner Poor & Havens, as attorneys for other plaintiffs, deponent respectfully asks that the Court join and consider the submissions by deponent and by Mr. Deming as one.

In answer to Paragraph 3 of defendants' affidavit: The affidavit shows only that there is extensive evidence and proofs to be gathered from many countries; the United States, Holland, Germany, England, and possibly from South America. Plaintiffs have never suggested that any country's witnesses are so important that those of the other nations set forth should be excluded. Said witnesses from

*Death Claimants' Surreply Affidavit in Opposition to
Texaco Defendants' Motion to Dismiss*

all of the above countries played a part in the omissions, commissions, both in participation and as an onlooker, all of which contributed to the sinking of the "Brandenburg". What is of prime importance is that the principal office of Texaco is in New York and its officers and employees who know and understand the interlocking corporate entities making up the worldwide oil complex called "Texaco" is American owned and controlled from its New York office. And that of course is the reason for the suit in this Court, rather than in Delaware (the state of incorporation) or any of the other offices in the locations around the world.

In answer to Paragraph 7 of defendants' affidavit: The series of communications between Smit-Tak/Rotterdam and Texaco in New York (with Smit-Tak/London and TOT as messengers between them) show very simply the workings of the defendants with respect to the issues involved herein and certainly raise questions of fact of actual control and operation, which can only be answered by a full trial and not by affidavits by attorneys telling the Court of entire crews of the "Texaco Caribbean" available only in London when it is common knowledge that they were a foreign crew earning lesser wages (the real reason for the vessel's ownership and lease-back arrangement in the hands of Texaco Panama) who were not English and even if still employed by the defendants would be where their vessel hit port. Deponent assumes that the defendants in due course could produce their employees for depositions in any port where the ships dock—and they do unload in Staten Island, New York on a periodic basis.

At this point, proof of the activities of Trinity House on January 11, 1971 is incomplete. Employment of the

*Death Claimants' Surreply Affidavit in Opposition to
Texaco Defendants' Motion to Dismiss*

"Queen Mother" on the 13th, two days after the "Texaco Caribbean" went down, and one day after the "Brandenburg" sank doesn't seem to be of much relevance and appears to have been mentioned by the defendants only because it was English (again, the defendants' purpose to cast the strongest connection with England, no matter how sparse the relevancy or materiality of the testimony).

In answer to Paragraph 8 of defendants' affidavit:

Again, the defendants mention the names of two men who may or may not have had any real importance in this overall series of communications between Smit's in Holland and TOT as a conduit to Texaco's New York office. Certainly Smits is in Rotterdam and whatever information is now available clearly shows no authority in the English office.

Defendants admit to "other personnel" being involved but make no mention of their whereabouts. They are in Rotterdam and in New York.

The lack of identification by the defendants of the actual communicants between Smit-Tak/Rotterdam and TOT can only cast further doubt of accuracy of defendants' assertion of exclusive English witnesses, law, presence, to the exclusion of the United States.

In Answer to Paragraphs 9 and 10 of defendants' affidavit:

Reports list the location of the "Leslie Lykes" at the scene of the collision. Deponent does not have information (the affidavit of co-plaintiffs may have). However, importantly, we are now discussing an American vessel with an

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American crew, all members of American unions. As such, it is not a question of whether the "Leslie Lykes" comes to New York but whether the individual crew members and officers are more likely to be working on an American vessel at this time and in the near future and will be more likely to come into New York or its environs, or into London. And certainly, the American seamen are more available in the United States than in England. Admittedly, the situation is somewhat indefinite, but certainly less so than the crew of the "Texaco Caribbean" whom the defendants now claim are available in England. That crew was foreign but since the vessels periodically reach New York, even as to those foreign crewmen, they are more likely to be in New York in the future than in London.

In answer to Paragraph 11 of the defendants' affidavit:

Deponent does not know why the affidavits from the defendants, Texaco's wholly-owned subsidiary in London should be the basis of possible destruction of this major law suit involving millions of dollars of loss in lives and cargo. Certainly, the least that should be expected is affidavits from truly impartial persons and business entities and not obviously self-serving declarations, not subject to any cross-examination on a motion of such importance. It would seem reasonable to have some reservation as to accuracy of affidavits from high officials from Texaco Overseas Tankship Ltd. (TOT), a wholly-owned Texaco subsidiary and Texaco Panama, Inc., another Texaco wholly-owned subsidiary, concerning a ship leased back to Texaco for movement of Texaco's cargo, when this suit is against Texaco, the parent and Texaco Panama, the subsidiary. While deponent will not state that the affidavit is false, can

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this Court state that justice is being served when no corroboration by way of cross-examination has been offered or is available to establish its truth. And on this bare, self-serving document, a dismissal of this suit? Deponent respectfully urges rejection of such tactics.

Mr. Hummel's affidavit identifying "Texaco" included all commonly known Texaco interests, including TOT and Texaco Panama. In the business world, TOT is Texaco; and so is Texaco Panama and all of the other wholly owned Texaco subsidiaries throughout the world. Persons dealing in the oil industry know this to be a reality. The energy crisis now upon us has thrown open some of the workings of the oil combines. Texaco has been identified by newspaper and magazine articles as one of the "big seven" and so it is, and it has become that by directing a huge production and marketing operation of oil in a way that gives it the most profit and which includes control over numerous wholly-owned subsidiaries. Can there be any doubt in view of the multitude of recent articles, all setting forth a pattern of complete domination from oil well to gas pumps and boilers.

In answer to Paragraphs 12 and 13 of defendants' affidavit:

The defendants agree that taking depositions may be reasonable but assert that the number necessary makes the practice unwieldy, etc. Have the defendants separated fact from fiction to advise this Court how many depositions are necessary as against the number necessary if the suit were brought in England. No figures are given to this Court, nothing is shown to the Court to establish what the witnesses are supposed to testify to, what they are supposed

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to know, the relevancy and materiality of their testimony. All that is before us is a listing of entire crews who are supposedly available only in England (and in reality are far more likely to be available in New York) and some witnesses of organizations (admitting others of the same entity who are not in England). It is a rather simple procedure to take depositions of Texaco's underlings and employees in London; it is a far more difficult matter to bring the suit in London and attempt the depositions of the Texaco Chairman, Maurice Granville, in New York; or of John C. Winger, the Chase-Manhattan Bank's Vice-President in Charge of its Energy Division in New York; or Frank Ikard, the President of the American Petroleum Institute, all of whom are necessary on the subject of domination and control of the combine from New York. Added to that are the working hierarchy of Texaco's New York office concerning the relationship between Texaco and Texaco Panama. And what of the crew members of the "Leslie Lykes" and the "Texaco Caribbean", far more likely in New York than in London; Smit-Tak/Rotterdam witnesses in Holland; the families of the deceased seamen in Germany. The importance of an English forum lessens, especially when viewed as a forum destroying the rights of the plaintiffs in this properly jurisdictioned suit in New York.

In answer to Paragraph 14(a) of defendants' affidavit:

The present whereabouts of the "Texaco Caribbean" crew is unknown and most certainly they will be scattered about the globe during the course of this litigation. Considering the amount of shipping into New York, are they not at least as likely to be in New York as in London, and probably more so.

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(b): The Smit-Tak offices are in Rotterdam, Holland, and most of the witnesses, including all of the heads of the firm as well as the crew of its vessel "ORCA" are Dutch and live in Holland. Mr. Mitchell of that firm was in its London office, at all times subject to approval of the Rotterdam office.

(c): Several depositions of one or two of the Trinity House ship's officers and some shoreside personnel are most likely necessary. In addition, all of Trinity House's records can be obtained from New York as easily as from London.

(d): The need for testimony of fishermen is at best minimal and a part of the defendants' approach to this motion to have this major litigation dismissed on the affidavit of a New York attorney. No names, no statements, nothing is submitted to show that there is any knowledge by the fishermen of rescuing any of the twelve deceased seamen of the "Brandenburg".

(e): Why witnesses from the "Orca" which came into the area several days after the collision between the "Texaco Caribbean" and the "Brandenburg"? No showing whatever has been made except to pinpoint the defendants' plan of wishful thinking about existence of witnesses for the purpose of this motion. Some proof, some showing of relevancy or materiality must be a fundamental requirement at this time.

(f): TOT's witnesses are in England. How many are necessary is again not stated as part of defendants' concept of having the matter dismissed on affidavit with no supporting documentation of relevancy or materiality.

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(g): Let the defendants not weep for the cost to the plaintiffs when it seeks to have this suit brought where the plaintiffs' position would, in fact, be entirely eroded under the existing general maritime law of England.

(h): Witnesses—who, what, how many, necessity, relevancy, materiality? All unanswered.

Summary: The issue, inter alia, of whether Texaco, an American, New York based corporation, having control over its wholly owned subsidiaries and in fact operating the vessel in its worldwide vertical structure from well to market, can compel the families of deceased seamen to sue it in London should be rejected. It seems obvious that the prime witnesses, such as the officers and personnel of its New York office, the banking officials who deal with Texaco, the private petroleum organization officials who deal with Texaco, and who know the Texaco operation, all have knowledge of the relationship between Texaco and Texaco Panama and where domination of the combine lies and should be available to testify. In New York they will be; in London they will not.

No matter where the suit is brought, some depositions must be taken. It is the nature of this litigation and should not cause any more difficulty or concern than the multitude of depositions taken in Europe in previous cases. Possible witnesses in the United States, England, Germany, Holland, Monaco and South America assure some movement, no matter where the forum is. But let the Court not be misled into thinking that the defendants, the parent and wholly owned subsidiary of a multi-billion dollar complex is concerned about the cost of taking some depositions or some inconvenience in going to Europe. The defendants

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are very aware of the differences of the general maritime law of the United States and that of England and though its papers are couched in terms of concern, its course is to destroy this meritorious \$25,000,000. law suit by forcing the plaintiffs to England. Whether this Court will close its doors to a suit against a New York based, American corporation under the circumstances spelled out in this motion is the real issue. Whether this huge oil combine will be *unable* to defend itself in New York is before this Court. Whether the plaintiffs will be unable to win their suit in London is before this Court. Whether the interest of justice (including convenience) should compel the properly jurisdictioned plaintiffs to start suit in England with its far less favorable law in view of the weight to be given to the plaintiffs' choice of forum is before this Court.

WHEREFORE, deponent respectfully requests that this motion be denied in its entirety and that this matter go forward to its ultimate conclusion on its merits.

/s/ HARVEY GOLDSTEIN

(Sworn to by Harvey Goldstein on this 14th day of January, 1974.)

**Texaco Defendants' Letter to Magistrate Jacobs of 15
Jan 1974**

(Letterhead of Poles, Tublin, Patestides & Stratakis)

January 15, 1974

MARTIN D. JACOBS
United States Magistrate
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Fitzgerald v. Texaco Inc. and Texaco Panama
Inc.—72 Civ. 5008, *et seq.*

Our File No. 12,515 MJT/JJD

Dear Magistrate Jacobs:

Yesterday morning we received by hand delivery a letter dated January 14, 1974 from Mr. Deming of Haight, Gardner, Poor and Havens. The letter and documents enclosed therewith is apparently a "Reply" to the defendants' reply papers. Such a procedure as is now being employed by Mr. Deming is highly improper and without authorization in law. Particularly is this so when (as in the present situation) plaintiff is attempting to place before the court new information and documents *all of which was obviously available to it at the time its answering papers were filed.*

It is respectfully requested, therefore, that the court disregard this latest ploy on plaintiffs' part and proceed with the determination of defendants' motion on the papers previously submitted. If, however, the court is of the opinion that it may properly consider Mr. Deming's letter and attachments thereto in reaching a decision on defendants' motion, it is respectfully requested that defendants be granted sufficient time within which to reply to said new matter as it appears that affidavits from abroad will be required to counter Mr. Deming's broad, unsupported statements.

Respectfully yours,

POLES, TUBLIN, PATESTIDES & STRATAKIS
/s/ JOHN J. DEVINE, JR.

357a

*Vessel and Cargo's Letter of 16 Jan 1974 to Magistrate
Jacobs*

JJD/mac

cc: MacDonald Deming, Esq.
HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, New York 10004

cc: Harvey Goldstein, Esq.
FUCHSBERG AND FUCHSBERG
250 Broadway
New York, New York 10007

*Vessel and Cargo's Letter of 16 Jan 1974 to Magistrate
Jacobs*

January 16, 1974

BY HAND

MARTIN D. JACOBS, United States Magistrate
United States District Court
Southern District of New York
Foley Square
Manhattan 10007

THOMAS I. FITZGERALD, as Public Administrator v.
Texaco, Inc. and Texaco Panama, Inc.
72 Civ. 5008 and Consolidated Cases
72 Civ. 5009-10, 73 Civ. 92-99, 117, 162 and 182
Poles, Tublin File #12,515 MJT/JJD
Our files #4246-1 and 1-A.

Your Honor:

We write to object strongly to Texaco defendants' interference in their counsels' letter to you of January 15, 1974, that our letter of January 14th is an "improper" submission of "new information and documents". *Each and every one of the six points discussed in our letter and appendix of*

*Vessel and Cargo's Letter of 16 Jan 1974 to Magistrate
Jacobs*

*January 14th** was covered in Hapag-Lloyd *et al.*'s papers in opposition submitted December 10, 1973, and was not believed by plaintiffs then or now to be subject to real dispute. Plaintiffs had no reason to expect that Texaco defendants would attempt to shelter a false denial of the Orca offer, together with so many other important misrepresentations, in papers which Texaco defendants apparently assumed for technical reasons ran no risk of exposure. That Texaco defendants did so is the real impropriety presented here.

Our letter of January 14th was made necessary by Texaco defendants' entirely unexpected and false denial of the January 11th Orca offer. This false denial without basis challenges Mr. Hummel's affidavit as to the offer as "not factually true", and sneers at the telex excerpts in the writer's affidavit as incomplete, misleading, "quoted", and undated. We felt forced to point out the lack of any basis

* 1. Smith offered the Orca to Texaco defendants at 10:30 A.M., Jan. 11, 1971. Hummel Affidavit, p. 2; Deming Affidavit, p. 3.

2. The M/V Leslie Lykes, a vessel of U.S. ownership, registry, homeport and crew, stood by the floating stern section of the Texaco Caribbean shortly after her explosion, and so witnessed that the wreck might at that time have been easily marked. Hummel Affidavit, pp. 2, 3; Deming Affidavit, pp. 2, 3; Plaintiffs Hapag-Lloyd *et al.*'s Brief in Opposition, pp. 20, 21.

3. The General Maritime Law as received and practiced in United States Admiralty Courts (not The Wreck Statute) makes Texaco defendants liable to plaintiffs for their failure to locate their wreck. Plaintiffs' Brief, pp. 12-13, 15.

4. The General Maritime Law as received and practiced in United States Admiralty Courts (not English admiralty law) will govern plaintiffs Hapag-Lloyd *et al.*'s claims here. *Id.*

5. Trinity House is governmentally authorized to act in connection with wreck operations. Deming Affidavit, pp. 6, 12-13; Plaintiffs' Brief, pp. 6-7.

6. Under the English authorities, *mere notice* by the owner of a wrecked vessel to the appropriate authority is said to relieve them of further responsibility. Plaintiffs' Brief, pp. 6-7.

*Vessel and Cargo's Letter of 16 Jan 1974 to Magistrate
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for the attack on Mr. Hummel, and to produce the complete telex—a production which Texaco defendants impliedly demanded. Having impliedly challenged as to produce the rest of the text of the telex, they now complain about our having done so. The rest of the telex merely corroborates in detail the facts already set forth by Mr. Hummel. The affidavit of Captain Watson, sent from England supposedly to meet the affidavit of Mr. Hummel, does *not* deny Mr. Hummel's allegation of the January 11 Orca offer, and Texaco defendants have stated no other basis for denying them.

We have no objection whatever to Your Honor's granting Texaco defendants time for the specific purpose of producing a sworn affidavit from Texaco's Mr. Loker on the subject of the January 11, 1971, offer by Smit to him of the Orca.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS

By MACDONALD DEMING

Attorneys for Plaintiffs Hapag-Lloyd,
Stork Amsterdam N.V. *et al.*

MD:br

BY HAND

POLES, TUBLIN, PASTESIDES & STRATAKIS

Thirty-Seven Wall Street

New York, N. Y. 10005

Att: Alvin Stern, Esq.

BY HAND

FUCHSBERG & FUCHSBERG

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New York, N. Y. 10007

Att: Harvey Goldstein, Esq.

**Magistrate Jacobs' Report Recommending Dismissal of
Plaintiffs' Actions on Certain Terms, of 23 Jan 1974**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008

(Judge Metzner)

[SAME TITLE]

Defendant's motion dated March 2, 1973 for an order, pursuant to Rules 12 and 56 FRCP, dismissing the actions on the ground of *forum non conveniens*, returnable before Judge Metzner, was referred to the undersigned to hear and report. Before filing any answering papers plaintiffs sought discovery and, as appears from my report dated July 25, 1973 and the order of the Court dated August 6, 1973 and also my report dated October 26, 1973 and the order of the Court dated November 5, 1973, certain discovery by way of interrogatories and the production of documents was allowed to plaintiffs.

The actions arise out of the collision on January 12, 1971 of the German vessel Brandenburg with the wreckage of the Texaco Caribbean in the English Channel following a collision on January 11, 1971 between the Peruvian vessel Paracas and the Texaco Caribbean. The present consolidated actions were brought under the general maritime law to recover damages resulting to the relatives (none of whom reside in the United States) of 12 deceased German seamen of the Brandenburg (for whom the Public Administrator was appointed representative) and damages resulting from the loss of the Brandenburg and her cargo. Plaintiffs state that "the suits are based upon the failure of the defendants

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to locate, mark or buoy the wreckage of the Texaco Caribbean as required by law" (Aff. Deming 2/7/73 par. 3).

I.

Since the burden rests upon defendants as we shall first set forth a summary of their version of the disaster and the matters likely to arise at the trial. Defendants have offered the affidavits of Robert R. Dimock, sworn to February 6, 1973 (president of Texaco Panama referred to as Texpan); E. F. Pointon, sworn to February 5, 1973 (management director of Texaco Overseas Tank Ship Ltd., referred to as TOT); and John L. Watson, sworn to December 21, 1973 (manager of operations department of TOT) which, briefly stated, set forth the following:

Texpan, a Panamanian corporation, was the sole owner of the Texaco Caribbean, registered under the laws of Panama. The vessel was managed and operated by TOT, incorporated under the laws of Great Britain with offices at London, England. TOT, in the business of shipping management and operation, managed the Texaco Caribbean and other vessels in the Texpan fleet. It equips and maintains the vessels, appoints agents of the ports, and settles all claims. The master, officers, and crew of the Texaco Caribbean were Italian nationals.

TOT had responsibility for taking all necessary action with respect to the wreckage. It did not have to obtain instructions from Texpan or Texaco.

The British corporation of Trinity House was engaged by TOT to locate and mark the wreck of the Texaco Caribbean and to warn other vessels of the presence of the wreck.

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TOT is familiar with the steps taken by Trinity House. There are no witnesses on behalf of Texpan who reside in the United States and most, if not all of the witnesses (employees of TOT, surviving crew members of the Texaco Caribbean, employees of Trinity House, crew members of British fishing vessel Accord and Viking Warriar) reside in England and are subject to compulsory process there.

Prior to the sinking of the Brandenburg, crew members aboard the British fishing vessels (Accord and Viking Warriar) observed the approach of the Brandenburg and after the sinking picked up survivors and the bodies of deceased seamen from the Brandenburg. According to the affidavit of Pointon, Trinity House, advised of the casualty, dispatched its vessel Siren to the scene which moored at the immediate vicinity and displayed a warning signal of three green lights in a vertical line. Numerous warnings were broadcast by English radio stations. However, the signal was not properly interpreted by the Brandenburg and it thereafter collided and sank (pp. 3, 4).

Defendants state that the following legal actions are pending in England: (1) an action by the cargo owners of the Brandenburg against the Paracas, Texaco Caribbean, and Trinity House; (2) an action by the Texaco Caribbean against the Paracas; (3) an action by the Paracas against Texaco Caribbean; and (4) an action by the Brandenburg against Trinity House.

Defendants stress that (1) the collision occurred in the English Channel; (2) Trinity House, which was engaged by TOT to locate and mark the wreck and to warn other

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vessels of its presence, is located in England together with its personnel and records; (3) the crews of the three vessels involved, and the families of the crew members on behalf of whom actions in this Court were brought, are foreign nationals none of whom reside in the United States; (4) if retained in this Court depositions of most of the witnesses would have to be taken; and (5) the absence of certain indispensable parties before this Court, being Trinity House, an English Corporation, and the owner of the Paracas, who are subject to cross claims by defendants.

II.

A summary of plaintiff Brandenburg's position is as follows: There is a heavy burden on defendants since the chosen forum "should rarely be disturbed". The activities of Texpan were directed and controlled out of Texaco's New York office. The necessary witnesses are available to this Court. The suits pending abroad are not significant. To require the action to be brought in England would be to deny justice since in England Brandenburg would have no remedy at all against Texaco Caribbean the English law being that "when a governmental authority agrees to act in connection with marking a wreck, the ship owner has no further obligation to do so" (Memo p. 7). The applicable law is the general maritime law as applied by the United States Courts, the collision having occurred on the high seas.

The Public Administrator adopts the arguments of Brandenburg. He also urges that the contingent fee retainer system is illegal in England and would require an advance payment of fees and extensive disbursements by the widows of the deceased seamen in order to enforce their claims (memo p. 16).

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III.

In the leading case of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1957) the practical considerations to be considered in determining the application of the doctrine were set forth and include the relative ease of access to sources of proof; the availability of compulsory process and the expense of obtaining the attendance of witnesses; a possible view of the premises; all practical matters that make a trial easy, inexpensive and expeditious; factors of public interest including administrative difficulties in congested centers of litigation; local interest in having localized controversies decided at home; advisability of deciding cases in the forum where they arise and whose law will be applied; and plaintiffs' choice of forum.

There are differences between the parties as to occurrences and the significance of the testimony of various persons. In order to put the matter in focus we shall set forth and discuss the likely proof to be offered, the conflicting views of the parties, and some comment.

1) *Location and Availability of Witnesses and Records:*

a) Defendants stress that TOT had the necessary authority, without reference to New York or anywhere else, to take necessary steps to engage the services of any one who might be required and that authority was exercised when it engaged the services of Trinity House and the vessel *Siren* to locate, mark and buoy the wreckage and also when TOT later, on January 13, 1971, engaged the *Queen Mother* for salvage operations (Aff. Stern 1/8/74 p. 5). The testimony of the employees of TOT and its records would seem most important. Such personnel and records are in or near

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England. Defendants assert that TOT personnel were immediately dispatched to the scene of the casualty and were present in Dover on January 11, 1973 (Aff. Stern p. 7).

b) Defendants stress that the testimony from the crew members of the Trinity vessel Siren, as well as other employees of Trinity, all of whom are in England, is of vital importance to show what steps were taken (after the Paracas collision) to locate and mark the wreck; the traffic in the area; the approach and subsequent collision of the Brandenburg; and whether other vessels observed and obeyed their signals. Plaintiffs do not question the importance of this testimony but state that it can be taken by deposition.

c) Defendants stress that the testimony of those on board the various fishing boats in the area, who are in England, is important not only in the issue of liability but also as to any damages (conscious pain and suffering). Plaintiffs question the importance of this testimony stating that they did not witness the sinking of the Brandenburg (Memo p. 18).

d) Defendants stress the importance of the testimony of the surviving members of the Texaco Caribbean (Italian nationals) having knowledge of the original Paracas-Texaco Caribbean collision—and also the surviving crew members of the Brandenburg who reside in Germany. Plaintiffs contend that any such testimony is irrelevant or of little significance since the cause of action is based upon the failure to locate and mark the wreck (Brief p. 18).

e) Plaintiffs state that before the sinking of the Texaco Caribbean the firm of Smit-Tak/Rotterdam, a salvage com-

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pany, offered to TOT the services of a searching and salvage vessel "Orca" and that Smit-Tak "understood that the reason for non acceptance was that it could not be accepted without authority from the Texaco Caribbean interests in New York" (Aff. Deming 12/14/73 p. 3). As particularly set forth in their papers (Deming Aff. December 10, 1973, pages 2 et seq.; Hummel Aff. May 16, 1973 (member of Claims/Insurance Department of Hapag-Lloyd) ; and letter from Brandenburg counsel dated January 14, 1974), plaintiffs claim that the sequence of events was as follows. The collision with the Paracas took place at 0400 on January 11. At 10:30 am on January 11 Smit's offered the services of its salvage vessel Orca but the offer was not accepted. The stern section of the Texaco Caribbean was afloat until 2:00 pm January 11. After the sinking of the Texaco Caribbean Smit renewed its inquiries. At 4:30 pm on January 11 the Siren arrived in the area. At 0730 on January 12, 21 hours after the Smit offer, the Brandenburg struck the stern of the Caribbean. After the sinking the Brandenburg employed Smit and the Orca located the wreck within half an hour of its arrival.

Defendants question this "hearsay testimony" and state that the first communication between Smit-Tak and TOT took place on January 13, not January 11, which was after the sinking of the Brandenburg, and related to salvage operations and not any attempt to locate, mark or buoy the wreck of the Caribbean (Aff. Stern 1/8/74 p. 4). Defendants also stress that Smit is a Holland organization and its personnel are Dutch; and that if this matter needed clarification the testimony of Watson (TOT) and Mitchell (Smit), in addition to other personnel at TOT's and Smit's,

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would be necessary, and that all these witnesses are located in or near England (Aff. Stern p. 5).

f) Plaintiffs also assert that after the collision with the Paracas the United States freighter "Leslie Lykes" (an American vessel with an American crew) arrived in the vicinity and that the members of the Leslie Lykes were important witnesses to the opportunities to mark the wreck while it was still only partially submerged; that its home port is Florida; that it trades regularly to United States ports (Aff. Deming p. 3). Defendants assert that the vessel trades between the Gulf ports and the Far East; and the New York Maritime Exchange indicates that the first and only time it has ever come to New York was in April 1966 (Aff. Stern p. 6).

g) Inquests were held in England as to the deceased crew members but plaintiffs assert that these inquests did not involve any inquiry into the cause of the accidents.

h) Plaintiffs assert that the central control of policy matters was had in New York relying upon the letter sent by Texpan in December 1967 stating, among other things, that "payment of hire and matters pertaining to charter party terms will be continuing to be handled by Texaco Panama in New York" (Aff. Deming p. 5). Defendants contend that TOT had the necessary authority to take all necessary steps and in fact exercised it (Aff. Stern p. 4).

i) While defendants have stated that this Court would not have the power to compel the attendance of any of the material witnesses (Aff. Stern February 28, 1973, p. 8) plaintiffs assert that under English Practice Rules compulsory process is available and the United States Court

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could apply to the English court for someone to be appointed as examiner (Aff. Deming p. 11)

2) *Pending Law Suits in England:*

These proceedings have already been set forth. Plaintiffs contend that the action by some of the cargo owners is the only English suit which has proceeded beyond filing; that the suits by Texaco Caribbean against Paracas and by Paracas against Texaco Caribbean, are irrelevant to the present action; and that the action by Brandenburg against Trinity was commenced solely to avoid time bar (Aff. Deming p. 9).

3) *Claims Over Against Paracas and Trinity:*

Defendants strongly urge that they have serious claims against Paracas and Trinity; that Paracas began the chain of events which led to the Brandenburg collision one day after the Texaco Caribbean sank; and that Trinity was on the scene at the time of the Brandenburg collision and was responsible for locating and marking the wreck. It is urged that the are indispensable parties who may not only be ultimately liable but whose testimony is essential (Aff. Stern p. 9). Plaintiffs urge that any claims by defendants against Paracas are irrelevant to the present suit which is based upon the failure to locate and mark the wreck; and the position of Trinity is of "small quantitative importance" since it could limit its liability for any negligence to \$80,000 (Memo p. 22).

4) *Applicable Law:*

While defendants contend that the rights of all parties will be governed by foreign law (Brief March 2, 1973,

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p. 22) plaintiffs urge that as the collision was on the high seas (12 miles from the English Coast, England like the United States having a 3 mile limit) the applicable law is the general maritime law as applied by United States Courts (Brandenburg Brief p. 12).

5) *English Law Compared with United States Law:*

a) Plaintiffs urge that in England there would be no remedy since under the English cases there is a rule "which would probably operate to relieve Texaco Caribbean from liability for its faults and failures, merely on the basis of Texaco Caribbean's invitation to governmental authority to take action to locate and mark" (Citing *The Utopia*, House of Lords (1893) 18 A.C. 492 and *The Douglas*, Court of Appeals (1882) 7 Probate Division 151).

Utopia presented the following situation. The Utopia collided with the Anson on March 17 and its hull was submerged. The owner lighted the wreck but on March 23 the captain of the port ordered a hulk in the vicinity and a hulk was anchored. A collision with the Primula took place on March 31. The lower Court found that the position of the wreck was not sufficiently indicated by the employees of the port. The House of Lords held that the owner was not liable. It stated that in order to hold the owner liable "two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them—and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect" (p. 498). The Court recognized that while the Utopia was not abandoned "in the sense that they gave up all rights of property and posses-

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sion" "control and management of the wreck, so far as related to the protection of other vessels from her, and her from them, was properly transferred to the port authority" and no default or negligence could be imputed to the Utopia "in allowing the port authority to take on itself the control of the lighting or in abstaining from interfering with the subsequent action of the port authority in the matter".

While the case recognizes that there is no liability on the owner for the default as such of the governmental authority it also recognizes that the owner is liable where there has been "misconduct or neglect" on its part apart from the conduct of the authority". It should be noted that in the present situation plaintiffs do charge a failure on the part of defendants themselves to call upon Smit to locate and mark the wreck.

b) On the other hand, plaintiffs urge that under United States law there is a non-delegable duty on the part of the owner and that the owner is not necessarily relieved by turning over the matter to a governmental authority.

In *Berwind v. White Coal Mining Co. v. Pitney*, 187 F.2d (2 Cir. 1951) the Coast Guard was called in after a series of accidents and in holding the owner liable the Court, after referring to the "wreck statute", 33 U.S.C. 409 (which applies only to navigable waters in the United States and makes it the duty of "the owner of such sunken craft" to mark it immediately and provides that "the neglect or failure" of the owner "shall be unlawful") said "It is a matter of public policy reflected in the statute to place the responsibility for marking the wreck squarely upon the owner alone. The appellant, who was the owner did nothing

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in that regard although as early as two hours before the first accident at the wreck the general foreman had noticed the barge had sunk in navigable waters" (p. 669). The Court further said

Nor do the unsuccessful efforts of the Coast Guard to locate and mark the wreck affect this liability. It has long been the law that an owner may comply with the statutory requirement for marking by getting the Lighthouse Department (Now the Coast Guard) to do it; when the Coast Guard does mark the wreck, whether properly or not, the owner is relieved of any statutory duty in that respect. The Plymouth, 2 Cir. 225 F. 483, certiorari denied, 241 U.S. 675, 36 S.Ct. 725, 60 L.Ed. 1232; New York Maritime Co. v. Mulligan, 2 Cir., 31 F.2d 532; City of Taunton-Sunken Wreck, D.C.S.D.N.Y., 11 F.2d 285, 1927 A.M.C. 135; The Barge Chambers, D.C.S.D.N.Y., 98 F. 194, 1924 A.M.C. 572; Wilson v. Mitsui & Co., D.C.N.D. Cal. 27 F.2d 185. The basis of this exception to the otherwise non-delegable duty is the fact that the private owner cannot interfere with the manner in which the government agency uses its discretion in the manner of marking. The Plymouth, supra. Although the Coast Guard's search for the wreck may, if made with due diligence in the light of the facts within the knowledge of the owner, operate to discharge the owner's duty, the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark. The Snug Harbor, 4 Cir. 40 F.2d 27. The dicta in

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Petition of Anthony O'Boyle, Inc., 2 Cir. 161 F.2d 966, 967, and Red Star Towing & Transportation Co. v. Woodburn, 2 Cir., 18 F.2d 77, 79, which may indicate the contrary should be discounted accordingly." p. 669).

Berwind appears to recognize that if there is a marking by the Coast Guard, "whether properly or not", there is no further liability. In this connection it is to be noted that defendants assert that the vessel Siren moored at immediate vicinity and displayed a warning which was not properly interpreted (Aff. Pointon, p. 4). Accepting the factual version of the defendants it may be argued that there was a "marking" by the Siren and that under the claimed facts there would be no difference between the English law and the United States law.

Thus, it is not clear that under plaintiffs' theory of liability or defendants' version of the sinking of the Brandenburg there is a difference between the English law and the United States law. It is also noted that plaintiffs stress that there was a failure to employ Smit-Tak to locate and mark the wreck and if this had been undertaken and accomplished the later Brandenburg wreck may not have occurred.

c) Moreover, assuming that the English law is less favorable in certain respect to the claimants than the United States law what is the significance of this in determining whether this Court should retain jurisdiction? Plaintiffs contend that "where the foreign law is so unfavorable that the granting of the motion might result in depriving the plaintiff of all remedy, this fact is a very powerful

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reason for retaining jurisdiction in the United States Court" (Brandenburg memo p. 8), citing the decision of Judge Bryan in *Chemical Carriers v. L. Smit & Co's Internationale* 154 F. Supp. 886 (S.D.N.Y. 1957).

In *Chemical* the libelant in an admiralty action was a Liberian corporation controlled by American citizens with its principal offices and place of business in New York. Libelant had a towage contract for the towage of libelant's vessel from Philadelphia to Rotterdam but the tugs assigned to the contract were in fact used to salvage a German vessel. The suit was in the alternative for damages for breach of the towage contract or a share in the salvage earned by respondent. A clause in the towage contract provided that all disputes should be submitted to the Netherlands Courts. This Court retained jurisdiction stating that the provision vesting exclusive jurisdiction in the Netherlands Courts was "unreasonable in its effect for several reasons" (888). The Court stated that apparently there could not be any remedy under Netherlands law and such a result "would not be in accord with the theory of salvage in this country" (p. 89). However, the Court also stressed that there was another action pending in this Court against the German vessel which was salvaged; again, that "any questions of convenience of witnesses and litigants would appear to be weighted in favor of the libelant"; and finally, that libelant was "essentially an American enterprise" (p. 889). Whether the principle urged by plaintiffs—that jurisdiction should be retained in view of the claimed less favorable English law—should be applied in the present situation where all of the claimants are foreign residents or nationals presents a doubtful question.

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As already stated, plaintiffs contend that "the contingent fee retainer system is illegal in England and would require an advance payment of fees and disbursements by the widows of the deceased seamen" and that "such an intolerable burden would act to extinguish the causes of action" (memo p. 16). Defendants urge that such an argument is irrelevant and has no place in the action. Furthermore, they contend that not only are legal fees and costs recoverable in England by a successful party but English counsel have advised them that under present English law a matter can be handled on a contingency fee basis when it has been referred to English counsel by American counsel who themselves are engaged on a contingency fee basis (Aff. Stern, p. 12).

IV.

The following decisions in this Court are instructive. *Fitzgerald v. Westland Marine Corp.*, 369 F. 2d 499, 501 (2 Cir. 1966); *Noto v. Cia Secula de Armanento*, 310 F. Supp. 639 (S.D.N.Y. 1970 Judge Weinfeld); and *Domingo v. States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y. 1972 Judge Bryan).

In *Fitzgerald* a vessel ran aground in the Aleutian Islands, broke up, and sank. An action was brought on behalf of 31 Spanish nationals and one Yugoslavian who perished. The claims were against the owner, a New York Corporation, charging negligence and unseaworthiness; a Japanese corporation and a Canadian corporation charging negligence in converting the ship from a tanker to a bulk

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carrier and in loading the vessel. In upholding the decision of the District Court dismissing the action against the Japanese and Canadian corporations the Court of Appeals stated that "unless the balance is strongly in favor of the defendant, plaintiff's choice of forum should rarely be disturbed" but the "doctrine leaves much to the discretion of the Courts to which plaintiff resorts" (p. 501). The following "compelling reasons" for dismissal were set forth. "Nearly all the witnesses" whose testimony relates to the claim of negligent conversion are in Japan. No process to compel their testimony in New York is available and there would be great cost in bringing them to New York. New York has "little connection with the accident which occurred off the coast of Alaska". The District Court would have to interpret the foreign law and all of the deceased crew men are foreigners. In the light of all these factors the Court concluded that "the balance is strongly in favor of defendants" and the District Court did not abuse its discretion (p. 502).

In Noto an Italian owned tanker exploded and sank in Iran. Thirty-one of the crew perished, and the actions were on behalf of the deceased crew members and their survivors. All of the plaintiffs were residents of Italy. The action was based on a maritime tort. At the time of the disaster the tanker was under charter to the subsidiary of an English corporation. The oil being loaded aboard the vessel had been acquired by an Iranian corporation which had sold it and passed title thereto to an English corporation. The defendants bringing on the motion were major American oil companies. The Court stated that it was to exercise its discretion "upon a realistic appraisal

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of facts" (648). It stressed that the disaster occurred in Iran; the ship was of Italian registry and ownership; plaintiffs were Italian nationals as were the crew members; the time charter of the vessel and the owner of the oil were not before the Court; the witnesses and records were all in Iran or Italy; if the case were retained it would be necessary to resolve complex issues of foreign law (648). The Court further stated that "plaintiffs' asserted claims have not relationship to or contact with any jurisdiction in the United States" (649).

In Domingo there was a collision between the Golden State and the Pioneer Leyte in Manila Harbor, Philippines. The Golden State was owned and operated by States Marine, a Delaware corporation, and the Pioneer Leyte, a Philippine corporation. There was a loss of 100 lives, all being citizens or residents of the Philippines, and the actions were by the next of kin or representatives of 99 decedents. There were also actions in other jurisdictions including Delaware and the Philippines. The following factors were relied upon in dismissing the action. "There is a legal interest in having localized controversies decided at home". All the events took place in the Philippines and plaintiffs source of proof are almost entirely there. The "vast majority of witnesses, both willing and unwilling, are in the Philippines" and the cost of obtaining willing witnesses would be minimal there as compared with here. Compulsory process in the Philippines would be available. It would be inconvenient to bring witnesses to the United States. Dismissal was granted even though the Court in Delaware had denied a similar motion to dismiss (p. 816). The motion was granted upon the express conditions that de-

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fendants (1) submit to the jurisdiction of the Philippine Courts in any action which might be commenced and (2) waive the statute of limitations as a defense in any such actions.

V.

While the parties have expressed differences on many matters which may go to the merits of the action, certain matters, many of which are obvious, stand out in bold relief. The disaster took place 12 miles off the English coast even though not strictly in England but in international waters. None of the beneficial claimants, nor any of the surviving members of the crews of any of the vessels, reside in the United States. The employees and personnel of TOT, whose testimony will be vital, as well as the records, are in or near England. The employees and personnel of Trinity, whose testimony will be vital, as well as its records, are in England. While all of these persons, and other persons, may be subject to compulsory process so as to take their deposition the deposition of witnesses is obviously a poor substitute for live testimony.

While plaintiffs have referred to the testimony of Smit-Tak as important their personnel are located in Holland. The contention that the conduct of defendants after the wreck was directed from New York has been sharply attacked by defendants; in any event the action viewed as a whole seems to have little if any contact with New York and whatever contact it may possibly have is strongly outweighed by all the other circumstances.

It is not clear that under plaintiffs' theory of liability or defendants' version of the sinking of the Brandenburg

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(after some marking of the wreck by the Siren) there is any essential difference between the English or United States law. And even if English law were less favorable in certain respects, it is believed that this is not a controlling factor under all the circumstances including the scene of the disaster and the foreign nationality of all the beneficial claimants.

In my view after weighing all the factors, there are most compelling reasons for dismissing the action and "the balance is strongly in favor of defendants".

Accordingly, it is recommended that the motion of defendants to dismiss on the ground of *forum non conveniens* be granted upon the express conditions that (1) defendants submit to the jurisdiction of the English Courts and (2) waive any defense of the Statute of Limitations as to any claims against them.

Dated: New York, New York
January 23, 1974

Respectfully submitted,

MARTIN D. JACOBS
United States Magistrate

Copies of this report have been mailed to counsel.

**Court's Memorandum Endorsement of 26 Mar 74
Adopting Magistrate's Report of 23 Jan 74**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

This matter was originally referred to Magistrate Jacobs for hearing and report.

Counsel, as can be seen from the file, have been given every opportunity to argue the question presented to the magistrate before this court. The magistrate previously submitted interim reports on July 25, 1973 and October 26, 1973, which were followed by orders of the court.

The magistrate's final report after submission of extensive briefs by counsel was submitted on January 23, 1974. Voluminous letters to the court commenting on the report were received on January 29, 1974, two on February 4, 1974, and the last on February 7, 1974.

The nineteen-page report of the magistrate reviews in detail the question from all aspects. I have read that report and all of the papers and I thoroughly agree with his review of the law and his suggestion for the disposition of this motion.

The motion to dismiss on the ground of forum non conveniens is granted on condition that (1) defendants submit to the jurisdiction of the English courts; and (2) waive any defense of the statute of limitations as to any claims against them.

So ordered.

Dated: New York, N.Y.
March 26, 1974

CHARLES M. METZNER
U. S. D. J.

**Judgment and Order of 28 Mar 1974 Dismissing
Plaintiffs' Consolidated Cases on Certain Conditions
as Representative of and Identical to Judgments and
Order Entered in SDNY Actions 72 Civ 5009 and
5010, and 73 Civ 92-99, 116, 166 and 182***

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

[SAME TITLE]

Defendants having moved the Court for an order pursuant to Rules 12 and 56, Federal Rules of Civil Procedure dismissing the actions herein, as against (a) Texaco Panama Inc., on the grounds of *forum non conveniens* and lack of jurisdiction of the controversy herein, and (b) as to Texaco, Inc., on the grounds that the complaints fail to state a claim upon which relief can be granted and lack of jurisdiction of the controversy herein, and the said motion having come on to be heard before the Honorable Charles M. Metzner, United States District Judge, and the Court having referred the said motion to the Honorable Martin D. Jacobs, United States Magistrate, to hear and report, and the Court thereafter on March 27, 1974, having handed down its memorandum endorsed agreeing with the report of the Magistrate dismissing the complaint on condition (1) defendants submit to the jurisdiction of the English courts; and (2) waive any defense of the statute of limitations as to any claims against them, it is,

* Texaco counsel take the same position regarding these italicized words as in note ** at p. iii *supra*.

Judgment and Order of 28 Mar 1974 Dismissing Plaintiffs' Consolidated Cases on Certain Conditions, as Representative of and Identical to Judgments and Order Entered in SDNY Actions 72 Civ 5009 and 5010, and 73 Civ 92-99, 116, 166 and 182

ORDERED, ADJUDGED AND DECREED, that defendants, Texaco, Inc. and Texaco Panama Inc., have judgment against the plaintiffs, Thomas I. Fitzgerald, Public Administrator of the County of New York, Administrator of the Estate of Hagen Pastewka, Deceased and Monica Pastewka, Individually, et al., dismissing the complaint as indicated subject to the provisions as stated.

Dated: New York, N.Y.
March 28, 1974

/s/ RAYMOND F. BURGHARDT
Clerk

Vessel and Cargo's Notice of Appeal
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

HAPAG-LLOYD, A.G., as owner of the M/V BRANDENBURG,
 and as bailee of the cargo laden thereon, *Plaintiff,*

—against—

TEXACO PANAMA, INC., as owner of the M/V TEXACO
 CARIBBEAN, *Defendant.*

STORK AMSTERDAM N.V.; INDUSTRIAS LACTEAS DOMINI-
 CANAS S.A. "INDULAC"; CORNELIS NOORDHOEK; QUIN-
 TANA HNOS; INC.; N.V. KONINKLIJKE DISTILLEER-
 DERIJEN "ERVEN LUCAS BOL:" (FORMERLY N.V.
 AMSTERDAMSCH E LIKEURSTOKERIJ "T LOOTSJE DER
 ERVEN LUCAS BOLS"); J. WRAY AND NEPHEW LTD.;
 N.V. VERKOOPASSOLITIE DER UERENIGDE LIKEUR-
 STOKERIJEN V.U.L.; THE RUM COMPANY (JAMAICA)
 LTD.; P. VAN LEEUWEN JR. 'S BUIZEJHANDEL N.V.;
 NOOYEN N.V.; HANDELSONDERNEMING "OKAHNI" N.V.;
 KOOLJMAN'S AGENCIES INC.; OVERSEAS CONSTRUCTION
 COMPANY; OVERSEAS CONSTRUCTION COMPANY CARIB-
 BEAN, L.; KONINKLIJKE NEDERLANDSE MAATSCHAPPIJ
 VOOR HAVENWERKEN N.V.; NETHERLANDS HARBOUR
 WORKS COMPANY (NETHERLANDS ANTILLES) N.V.;
 ANTEM N.V.; BOGANA N.V.; PET CARE, N.V.; N.V.
 MADURO INTERMAVEN; S.E.L. MADURO AND SONS LTD.;
 LAGENDIJK'S POETSKATOEN- EN POETSLAPPE-FABRIKEN
 N.V.; CARLOS C. JESURUM AND Co.; LA CITRIQUE BELGE
 S.A.; RAPID SALES COMPANY LTD.; ZEMENT EXPORT
 RHEINWEST G.M.B.H.; A.G. "WESER" SEEBECKWERFT;
 MATAB N.V.; AND VIHAMIJ BUTTINGER N.V.,

—against—

Plaintiffs,

TEXACO PANAMA, INC. as owner of the M/V TEXACO
 CARIBBEAN, *Defendant.*

Vessel and Cargo's Notice of Appeal

PLEASE TAKE NOTICE, that Hapag-Lloyd, A.G., plaintiff in action 73 Civ. 166, and Stork Amsterdam N.V.; Industrias Lacteas Dominicanas S.A. "Indulac", *et al.*, plaintiffs in action 73 Civ. 182, by their attorneys Haight, Gardner, Poor & Havens, hereby appeal to the United States Court of Appeals for the Second Circuit from that part of this Honorable Court's final order, dated March 26, 1974 and filed on March 27, 1974 in all those cases consolidated under the caption "*Thomas I. Fitzgerald, Public Administrator, etc. of The estate of Hagen Pastewka, et al., v. Texaco, Inc. and Texaco Panama, Inc.* (72 Civ. 5008 and consolidated cases 5009 and 5010, 73 Civ. 92-99, 117, 166 and 182 CMM)", which dismisses the complaints of said plaintiffs.

Respectfully submitted,

April , 1974

[Date of filing, for notation by Clerk on copies to be served]

HAIGHT, GARDNER, POOR & HAVENS

By /s/ MACDONALD DEMING
A Member of the Firm

Attorneys for Appellant
Hapag-Lloyd, A.G., and
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Death Claimants' Notice of Appeal
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
72 Civ. 5008 C.M.M.

THOMAS I. FITZGERALD, Public Administrator, etc., of the
Estate of HAGEN PASTEWKA, et al.,

Plaintiffs,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants.

PLEASE TAKE NOTICE, that Thomas I. Fitzgerald, Public Administrator of the Estate of Hagen Pastewka, et al., plaintiffs in this action, by his attorneys, Harvey Goldstein and Fuchsberg & Fuchsberg, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of this Honorable Court's final order, dated March 26, 1974 and filed on March 27, 1974 in all those cases consolidated under the caption "Thomas I. Fitzgerald, Public Administrator, etc. of the Estate of Hagen Pastewka, et al., v. Texaco, Inc. and Texaco Panama, Inc. (72 Civ. 5008 and consolidated cases 5009 and 5010, 73 Civ. 92-99, 117, 166 and 182 CMM)" which dismisses the complaints of said plaintiffs.

Dated: New York, New York
April 15, 1974

Yours, etc.,
HARVEY GOLDSTEIN and
FUCHSBERG & FUCHSBERG
Attorneys for Plaintiffs
By HARVEY GOLDSTEIN
Office & P.O. Address
250 Broadway
New York, New York 10007

385a

Death Claimants' Notice of Appeal

To: HAIGHT, GARDNER, POOR & HAVENS, ESQS.
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7/29/74

Rec'd One Copy of Appendix

Pols, Turkin, Patented
v. Stratahio

RECEIVED

FUCHSBERG & FUCHSBERG

BY C. Brower

DATE 7/29/74 TIME 2²⁵ PM

